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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF New York

JOSE BAUTA,
Plaintiff,
-against-
United States Courthouse
Brooklyn, New York
GREYHOUND LINES, INC.,
SABRINA ANDERSON, AKOS
GUBICA, KAROLY GUBICA, AND
CAV ENTERPRISE, LLC,
Thursday, May 10, 2018
9:00 a.m.
Defendants.

TRANSCRIPT OF CIVIL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE RAMON E. REYES
UNITED STATES MAGISTRATE JUDGE, AND A JURY

APP E A R A N C E S:

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1 A P P E A R A N C E S: (Continued.)
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20 Proceedings recorded by mechanical stenography, transcript
produced by Computer-Aided Transcription
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1 (In open court.)

2 (JUDGE RAMON E. REYES enters the courtroom.)

3 (The following occurs outside the presence of the jury.)

4 THE COURT: A couple of things. First, Plaintiff's
5 Exhibit 365, which consists of Dr. Thomas' bills for services
6 rendered have on them diagnoses and CPT codes and before they
7 are given to the jury, these are going to be redacted -- if
8 they are going to go to the jury, they will be redacted. They
9 are not relevant for this exhibit. It does not matter what
10 the diagnoses are. This is purely to support the damages and
11 Dr. Thomas testified as to what he diagnosed, if anything, on
12 Mr. Bauta. So, that is one thing.

13 I will say in addition it is somewhat prejudicial
14 because of the PTSD indication in that diagnosis which
15 Dr. Thomas actually did not make and he testified to that.
16 The plaintiff's motion to strike testimony concerning criminal
17 convictions is denied. I have reviewed the designations that
18 were submitted by both sides and there was sufficient
19 testimony from Dr. Honor that convictions and the existence on
20 a database are sufficient to cause stress, so, therefore, that
21 testimony will remain. We have not heard from Mr. Bauta yet
22 and that is my ruling on that.

23 MR. McELFISH: May I be heard?

24 THE COURT: No.

25 MR. McELFISH: Well, I want to be heard at some

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1 point.

2 THE COURT: You have already been heard. You made
3 your pitch yesterday. You gave the designations that you gave
4 and I read them and I disagree with your argument.

5 MR. McELFISH: I actually didn't get to make the
6 argument. We said we were going to save it until today and
7 Mr. Mannion cut me off. So I actually didn't get to make
8 argument.

9 THE COURT: Go ahead, Mr. McElfish.

10 MR. McELFISH: I'm sorry?

11 THE COURT: Go ahead.

12 MR. McELFISH: It's just, Your Honor, obviously for
13 purposes of the record in the event of an appeal, just that
14 the two issues that I wanted to highlight for the court are
15 that, first of all, the use of the convictions in the case
16 going forward are inappropriate for the following reasons:
17 Number one, I do expect that -- and I want to break it down
18 this way: If they use them, for instance, with Mr. Bauta to
19 just ask him if he's been convicted, that is a use for
20 impeachment under 609 and that's entirely inappropriate given
21 the amount of prejudice. If you have that alone putting
22 emotional distress aside for a second, if I may.

23 THE COURT: That was not part of your original
24 application.

25 MR. McELFISH: Sure it was.

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1 THE COURT: Now you are arguing a different thing.
2 You wanted to strike the testimony that already happened from
3 those other folks.

4 MR. McELFISH: Again, I asked a couple of times if I
5 could make the argument and frame it yesterday and I was told
6 to wait and so I didn't get to make it. I submitted the
7 designations. I apologize if there was a misunderstanding on
8 that point.

9 THE COURT: These designations that you submitted
10 have nothing to do with the argument that you just made.

11 MR. McELFISH: They do. I don't mean to correct
12 you, but they do.

13 THE COURT: They do not. You are talking about the
14 use of the criminal convictions for impeachment of Mr. Bauta.
15 The designations of the testimony that we heard has absolutely
16 nothing to do with that.

17 MR. McELFISH: If I could make the argument and
18 perhaps you will see my point. Perhaps.

19 THE COURT: Finish your argument.

20 MR. McELFISH: The reason why the designations
21 relate to that issue is because, first of all, when we moved
22 to exclude them in the beginning, we moved on both grounds,
23 but they were not impeaching because they were not allowable
24 under 609 because they were too old. We would move to exclude
25 any sort of questioning of Mr. Bauta on the grounds that they

1 are excluded under 609, separate from the emotional distress
2 issue just to say, Mr. Bauta, you've been convicted, haven't
3 you.

4 The reason the designations are relevant to that is
5 that there's no evidence in the record that the convictions
6 have had any impact on him at all; him, himself, at all. So
7 it would only necessarily fall back to just that issue of just
8 to dirty him up or impeach him.

9 On the separate issue of emotional distress under, I
10 guess, you could call it 403, our issues with say the
11 Dr. Honor passages, for instance, doesn't connect up his
12 opinion that Mr. Bauta actually suffered emotional distress.
13 Now, I understand your point, Your Honor, that you read the
14 designation. Dr. Honor said, well, it could, but not
15 necessarily so.

16 The reason I brought this application to begin with
17 is I believe the burden is on the defense to establish that
18 doctor -- for instance, that Dr. Honor said, look, I evaluated
19 Mr. Bauta, I evaluated the records and I do believe that the
20 criminal convictions, particularly the nature of the ones he
21 suffered or underwent, could contribute to stressors in his
22 life. I certainly do believe that's true. It's reflected in
23 the testing and the records, whatever it is. And in light of
24 the prejudice that the convictions do create, it's
25 inappropriate to continue to allow them to attack on the

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1 emotional distress because they did not ask Dr. Honor that
2 question. It doesn't connect up.

3 All they had to do is say, Dr. Honor, do you have an
4 expert opinion, sir, as to whether either or both of
5 convictions have caused Mr. Bauta himself emotional distress
6 or contributed to his underlying condition. And he would have
7 an opinion on that which would most likely would have been it
8 did not.

9 Now, if his opinion was, of course it did, I
10 evaluated him. I believe it did. It wasn't a major factor
11 because it was so long ago, for instance. That's the kind of
12 opinion that keeps it in this case. So for him to say, not
13 necessarily so, and then Mr. Barman who was the counsel on
14 that issue came back and moved on, it left it hanging right
15 there.

16 THE COURT: He did not say, not necessarily so.

17 MR. McELFISH: He did.

18 THE COURT: Those were his words?

19 MR. McELFISH: Yes, sir. They're in the transcript.

20 THE COURT: What page?

21 MR. McELFISH: It was right before the sidebar with
22 Dr. Honor and I want to say, like, around 335. Let me get the
23 numbers. No, 467. Let me get there. That might be it.

24 THE COURT: That was in relation to whether it shows
25 lack of impulse; correct?

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1 MR. McELFISH: Correct. So --

2 THE COURT: Immediately above that he admits that --

3 MR. McELFISH: It can. Correct.

4 THE COURT: And we have been letting in a lot of
5 testimony from a lot of experts on a lot of issues that it
6 can.

7 MR. McELFISH: That's my point, is that given --

8 THE COURT: From both sides.

9 MR. McELFISH: Given is the prejudice -- look,
10 financial stressors are not prejudicial. If his mom died,
11 that's not prejudicial. This is prejudicial. And what he
12 needed to do -- I need to make the record, Judge, whether you
13 agree me or not. I got to make this record because I believe
14 in it.

15 THE COURT: So do I because my reasons are going to
16 be what the Court of Appeals determines.

17 MR. McELFISH: What they needed to do and what I
18 would have done if I were them is I would have said, look,
19 Dr. Honor I know you said it can. Anything can. Did you
20 evaluate Mr. Bauta and the convictions to determine whether or
21 not in fact these particular items in his life caused him
22 stress and created an underlying preexisting condition, yes or
23 no, sir. He would have said no. Okay, if he said yes, then
24 you would be well within your rights to say, stop arguing
25 this, stop, enough, it's in. Your own expert admitted it.

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1 As of right now it's not in evidence, it doesn't
2 connect up and given the prejudicial nature of it, it is going
3 to cause prejudice to the jury for no real evidentiary reason.

4 THE COURT: Anything else?

5 MR. McELFISH: No.

6 THE COURT: All right. The motion is denied. It is
7 relevant because Mr. Bauta is claiming that he has emotional
8 distress based on his inability to provide for his daughters
9 because he can't work because of this accident. There was
10 evidence and there will be further evidence that he was fired
11 from his last job because of a criminal conviction and that
12 could be the cause -- and I think you are going to have
13 evidence further that he was not able to care for his
14 daughters after that which predates the accident. That could
15 be the cause of his stress. It's relevant.

16 Number 2, it's not unduly prejudicial because we're
17 using the word "conviction." We are not saying what the
18 convictions were for or any of that. It is relevant and not
19 unduly prejudicial. And that is the balance. That is my
20 ruling. You have made your record. If I am wrong, the Court
21 of Appeals will reverse.

22 MR. McELFISH: Last word.

23 THE COURT: No.

24 MR. McELFISH: Because of the searchable database
25 part, it became even more unduly prejudicial.

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1 THE COURT: You know what, every criminal
2 conviction, regardless of the severity, the type, what it is
3 about is on a publicly circulable database; every one.

4 MR. McELFISH: I like the issue.

5 THE COURT: You know this. Okay? The motion is
6 denied.

7 You need to be careful though, Mr. Barman, on how
8 you question Mr. Bauta on this.

9 MR. BARMEN: Understood, Your Honor. I'm nothing if
10 not careful.

11 THE COURT: We're ready to go with Mr. Bauta?

12 MR. McELFISH: Yes, just a quick restroom break.

13 THE COURT: Another one?

14 MR. McELFISH: I've been doing designations.

15 THE COURT: Off the record.

16 (Discussion off the record.)

17 THE COURT: We are back on.

18 MR. McELFISH: I had been speaking to the defense
19 about this issue on a couple of occasions and we don't seem to
20 see eye-to-eye on it. In the opening statements we referenced
21 on videotape and played videotape from an eyewitness,
22 Mr. James Evans. If you recall, there were two videotapes
23 from the scene showing the firefighters and the fire trucks
24 and all of that stuff; sort of mayhem of the scene. We rest
25 after the Mr. Bauta. We seek to move to admit those videos

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1 and there's an objection.

2 MR. BARMEN: Our position, Your Honor, is that I
3 agreed to let him show it in opening as a demonstrative, but
4 in terms of entering it as an exhibit, no foundation has been
5 laid. We haven't heard from the person who took it. Mr.
6 Evans, apparently they're bringing him in in the punitive
7 stage. They certainly could have brought him in in this phase
8 if they wanted to to authenticate the video. There's no
9 authentication, there's no foundation and we would object to
10 it being used.

11 THE COURT: What is the relevance of that in the
12 compensatory damages phase?

13 MR. McELFISH: The same relevance for showing it in
14 opening, is that it shows the scene of the accident. It shows
15 what it was like immediately after the accident. You know,
16 they're bringing up the legitimacy if you will of the EMT
17 examinations. There's so much mayhem and so much confusion
18 going on at that time. And, as to foundation, he testified
19 and laid foundation in the Pennsylvania case for the same
20 reasons, to show what the scene looked like.

21 There's certainly foundation that's under oath in a
22 record. I can certainly show you it. He is coming for
23 punitives, but he has vacation and different travel
24 arrangements and couldn't come twice for the trial. There's
25 foundation in the record and Mr. Barman knows it.

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1 MR. BARMEN: Well, I disagree. He came to
2 Pennsylvania and he testified to it, but he hasn't come in
3 here. In addition, it's not listed under Rule 16 under
4 compensatory exhibits. It's only listed in the Rule 16 as a
5 punitive exhibit, which is really what they want to use it
6 for.

7 MR. McELFISH: We had a stipulation that Mr. Barman
8 and I signed going back a year or two that anything exchanged
9 and used in Pennsylvania could be used as an exhibit in New
10 York and it was listed on our Rule 16. So, I mean, it's
11 really getting nit-picky at this point considering where we
12 are with exhibits and admissions.

13 MR. BARMEN: I'm sorry, we don't consider the
14 Court's procedure nit-picky. It wasn't listed in the Rule 16
15 as a compensatory exhibit. It's not something they forgot to
16 do. They listed it in their punitives which is that's their
17 intent to use it. Yes, we had an agreement on use of exhibits
18 in one case could be used in another, but certainly our
19 agreement doesn't somehow supersede the Court's procedural
20 rules relative to Rule 16.

21 MR. McELFISH: If he felt that way, I'm not sure why
22 we were using it in the opening statements. I don't like to
23 use things in opening statements that are not going to be
24 admitted as you have seen. I move to admit everything that's
25 used because, you know, it's part of the case.

1 MR. BARMEN: Mr. McElfish knows when we had this
2 discussion I said that I don't have a problem with you using
3 it as a demonstrative. That's all I ever agreed to. Now, had
4 they brought in the witness to lay the foundation then I
5 wouldn't have this argument, but they didn't.

6 MR. McELFISH: I agreed to let you use several
7 hospital records from Brookdale as exhibits in your opening
8 statements related to STDs and other things. If you don't
9 want to agree to the video at the accident scene because it
10 lacks foundation, I will object to the admission of the
11 hospital records because they lack foundation.

12 So there's two on one again.

13 MR. MANNION: Your Honor, when we did this at
14 sidebar we talked about it. As you know, I specifically
15 indicated to Mr. McElfish, we're not going to make you bring
16 in all the medical providers to authenticate all of these as
17 long as we get the same reciprocation on these records and he
18 agreed to that. You can't revoke that.

19 MR. McELFISH: I actually didn't agree to that. I
20 specifically said we'll have to see what it is you want and
21 I'm seeing what it is you want. I'm not agreeing to it.

22 MR. BARMEN: I stand on my argument, Your Honor.

23 MR. McELFISH: The same.

24 MR. MANNION: If Mr. McElfish can revoke his
25 agreement on those medical records, we revoke ours and move to

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1 exclude all the medical records to date. This is the most
2 disingenuous thing that I've seen and it's improper and he
3 knows it's improper.

4 THE COURT: Let's stop, please. All right, can you
5 pull that up for me?

6 MR. McELFISH: The?

7 THE COURT: The video.

8 (Video played.)

9 MR. McELFISH: 144.01 for the record.

10 144.04, for the record.

11 (Video played.)

12 MR. McELFISH: That's it.

13 THE COURT: What is the problem with that? I
14 understand your arguments, but --

15 MR. BARMEN: Because it's already been shown.
16 Mr. Bauta, if he testifies consistently with his deposition
17 transcripts -- Mr. Bauta is in the room.

18 THE COURT: Mr. Bauta, please walk outside.

19 (Mr. Bauta leaves courtroom.)

20 MR. BARMEN: If he's going to testify consistently
21 with his three prior depositions, he's going to say I don't
22 remember anything from the scene, it's all a blur. That adds
23 nothing to try and get the chaos of the scene through him.
24 It's already been shown once. They saw the pictures of
25 Ms. Hoang umpteen times. I'm sure he intends to use those

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1 photos with Mr. Bauta during examination.

2 The fact that it's listed only under punitive
3 evidence is that what he intended to use it for. It's meant
4 solely to inflame the jury. Mr. Bauta can't say this is what
5 the scene is like when he testified three prior times, I don't
6 remember what the scene is like, it's a blur.

7 THE COURT: It's what exhibit number?

8 MR. McELFISH: 144.01 and 144.04 because there were
9 four total exhibits.

10 THE COURT: Show me where this is listed in the
11 Joint Pretrial Order.

12 MR. SAAL: Page 42, Your Honor.

13 THE COURT: I do not see it.

14 MR. SAAL: I'm sorry, that exhibit is on page 40.

15 THE COURT: 144.01 and .04. And so the defendant's
16 only objection is that it is not relevant to the issue of
17 punitive damages?

18 MR. BARMEN: No, it's not relevant to the issue of
19 compensatory damages.

20 THE COURT: No, no. I am saying from the Joint
21 Pretrial Order.

22 MR. BARMEN: Right. And we would have had other
23 objections if they listed it under compensatory, but they
24 didn't.

25 THE COURT: What other objections would you have if

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1 they were listed under compensatory?

2 MR. BARMEN: Starting with what I just argued, Your
3 Honor. Mr. Bauta has been very clear throughout this entire
4 case he has zero memory of the scene of the accident. So how
5 could he somehow use that to say this is what the scene was
6 like. Additionally, we have a foundational argument because
7 James Evan's hasn't come in here to say that's the video that
8 I took.

9 MR. McELFISH: I'd like a chance to respond.

10 THE COURT: Go ahead.

11 MR. McELFISH: Mr. Barman is incorrect. Mr. Bauta
12 testified that he recalls certainly Ms. Huang. He also
13 recalls the two EMTs, although he doesn't know what they did
14 for him. He doesn't remember that, but he remembers them
15 trying to tend to him. He doesn't remember how he got out of
16 the bus, but he remembers being outside the bus. So
17 Mr. Barman is completely incorrect on that.

18 With respect to the foundational argument, the --
19 again, it's -- we can provide you with the transcripts of
20 Pennsylvania where Mr. Evans testified, these were videos I
21 took on my cell phone. It's in the transcript.

22 THE COURT: It is not relevant to compensatory
23 damages. Denied. Get it in -- try it get it in for punitive.

24 MR. McELFISH: I didn't hear you.

25 THE COURT: You can try to get it in for punitive

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1 through Mr. Evans, but it is not relevant to compensatory
2 damages. It does not show Ms. Huang and it doesn't show the
3 EMTs who treated him and he doesn't remember how he got out of
4 the bus. It is not offering anything towards his physical or
5 emotional damages.

6 MR. McELFISH: It does, because as Dr. Mobin
7 testified, their big issue on that issue is that he was
8 treated and there was no problem but it's because of the
9 confusion and all the craziness around and the scene -- which
10 is relevant. The scene is relevant to what happened that day
11 and his state of mind. He didn't say he didn't remember
12 anything. He said he remembered being outside the bus and
13 seeing the chaos and then he was pulled over to deal with
14 Ms. Hoang. He just didn't remember how he got outside the
15 bus. So they've got Ms. Peachey ready to testify tomorrow how
16 this was like --

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18 (Continued on the following page.)
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1 (Continuing)

2 THE COURT: We have no time stamp on this. We have
3 no indication as to when it was taken relative to when
4 Mr. Bauta was outside the bus; if he had been taken to -- by
5 ambulance already. There is nothing of that.

6 MR. McELFISH: I think Mr. Evans did put a time
7 frame on it. I can check the transcripts from Pennsylvania on
8 that. I didn't anticipate that.

9 THE COURT: Well, if it is relevant as to what
10 Mr. Bauta saw outside the bus, and that affects his emotional
11 state. We do not know when it was taken vis-à-vis when
12 Mr. Bauta was taken outside the bus. This could have been
13 20 minutes after. This could have been five minutes before.
14 We do not know.

15 You are saying he saw this. How do we know that?
16 Do we have proof of that?

17 We need to get going with Mr. Bauta, but I want to
18 address a question that Mr. McElfish raised, I believe, off
19 the record, after yesterday's trial day. The use of
20 PowerPoint in closings. The only thing I will permit you to
21 use PowerPoint for is to show exhibits that have been admitted
22 into evidence and if you want to highlight a piece of that,
23 that is fine. No bolding, no underlining, no additional
24 things. It is what the exhibit is. That is it. No title
25 slides, anything like that. You just use it to show evidence.

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1 That is it.

2 MR. BARMEN: Will that include transcripts of
3 testimony, Your Honor?

4 THE COURT: Yes -- no. It will exclude transcripts
5 of testimony; meaning -- you are going to show the trial
6 transcript?

7 MR. BARMEN: At times in certain cases I've pulled
8 up pieces of trial transcript to highlight testimony.

9 THE COURT: No.

10 MR. BARMEN: Thank you.

11 THE COURT: Unless it is -- I do not send trial
12 transcripts back into the jury room, unless they ask for
13 specific testimony. You can say -- you can use the trial
14 transcript and say Mr. Smith said X, Y and Z. That is what he
15 said. If you have any question, ask for his testimony to be
16 read back; but you are not going to put it up on the screen.

17 MR. BARMEN: Okay, thank you.

18 MR. McELFISH: I personally don't know what I'm
19 allowed to put on the transcript after that.

20 THE COURT: As I said --

21 MR. McELFISH: I heard what's excluded. I don't
22 know what's allowed.

23 THE COURT: An exhibit. You can put up an
24 exhibit that has been admitted into evidence. And if you want
25 to highlight, not highlight, if you want to draw out a

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1 particular piece of that like you have been doing with the
2 gizmo up there, you can do that. But you cannot augment it in
3 any way by highlighting something, annotating it, anything
4 like that.

5 MR. McELFISH: We can only cull it out or make it
6 bigger, for instance?

7 THE COURT: Precisely.

8 MR. McELFISH: And we can put testimony on a slide,
9 but --

10 THE COURT: No, you cannot.

11 MR. McELFISH: No, no. But we can put our summary
12 of the testimony on a slide.

13 THE COURT: No, you cannot.

14 MR. McELFISH: I'm confused.

15 THE COURT: I do not know why. It is pretty simple.

16 MR. McELFISH: Well, because you said only --

17 THE COURT: The only thing you can do is put up
18 exhibits. That is it. Nothing else. You can tell the jury
19 in your closing, and Joe Smith said this. If you are unsure,
20 ask for the testimony to be read back. That is what he said.
21 You have got the trial transcripts, you know what he said.
22 You can tell the jury what they said, but you cannot put it up
23 on the screen.

24 MR. BARMEN: Thank you, Your Honor.

25 THE COURT: I want to avoid the opening debacle that

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1 we had with the rabbits coming out of a hat and all sorts of
2 other stuff.

3 So let's get Mr. Bauta in here -- well, actually,
4 Let's get the jury in here, first.

5 THE COURTROOM DEPUTY: All rise.

6 (Jury enters.)

7 THE COURT: You may be seated.

8 Please call your next witness.

9 MR. McELFISH: Yes, Your Honor.

10 Plaintiff calls plaintiff, Jose Bauta.

11 (Witness enters and takes stand.)

12 THE COURT: Mr. Bauta, please raise your right hand.

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14 (Continued on following page.)

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Bauta - direct - McElfish

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1 J O S E B A U T A ,

2 called as a witness having been
3 first duly sworn, was examined and testified
4 as follows:

5 THE COURT: Please be seated.

6 You may inquire.

7 MR. McELFISH: Thank you.

8 DIRECT EXAMINATION

9 BY MR. McELFISH:

10 Q Good morning, Mr. Bauta.

11 A Good morning.

12 Q Please introduce yourself to the jury.

13 A Good morning, jury. My name is Jose Bauta; born and
14 raised in Brooklyn. I'm Hispanic. I lived with my mother
15 until she passed away; my dad, two sisters and a brother. I
16 have three kids; two girls and a boy. I don't know what else.

17 Q That's good.

18 All right. Now, currently, Mr. Bauta, where do you
19 live?

20 A Say that again.

21 Q Where do you live, currently?

22 A I live at 590 Williams Avenue in Brooklyn, New York.

23 Q And where were you born and raised?

24 A I was born in Masullas, which is the south side of
25 Williamsburg in Brooklyn.

Bauta - direct - McElfish

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1 Q East New York?

2 A No, it's in Williamsburg. I was born -- I was raised in
3 East New York.

4 Q Okay. And you've mentioned you have two sisters and a
5 brother?

6 A Yes, correct.

7 Q And what are their names?

8 A One, my oldest sister is Maria Bauta. My second sister
9 is Salinia Rivera. And my brother is Angel Bauta.

10 Q You also have a brother-in-law?

11 A Yes, Martin Rivera.

12 Q And if you would please, give the jury an idea of your
13 upbringing when you were growing up with these brothers and
14 sisters.

15 A Of course we all brothers, siblings, they argue; fight.
16 Typical sibling things.

17 But mother and father was strict with religion,
18 Sunday school, education, pretty much family first. Just
19 respect one another. Respect your siblings. Respect your
20 neighbors and stuff like that.

21 Q Was your household -- did you grow up in a Puerto Rican
22 culture in your household?

23 A Yes.

24 Q Can you explain that, please.

25 A Just family, which is a Hispanic thing; family first.

Bauta - direct - McElfish

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1 Then look out for your neighbors.

2 Q What language did you speak growing up? What was your
3 primary language in your household?

4 A Spanish.

5 Q And did you celebrate holidays from Puerto Rico?

6 A Yes.

7 Q And which ones did you celebrate?

8 A The typical ones, like Christmas, New Years. Sometimes
9 we celebrated Cinco de Mayo, that depends.

10 What else? It was quite a bit of stuff, you know.

11 Made sure we always had, like, family events to get together
12 with the family. Meet new family members when we find out who
13 they are and we meet them.

14 Q Okay. Where did you go to high school?

15 A Thomas Jefferson High School in Brooklyn.

16 Q And did you finish high school?

17 A At the moment, when I was in high school, I didn't
18 finish. I went three years. But eventually I did finish it.

19 Q Okay. And why did you not finish?

20 A Hanging out with the wrong crew, with the wrong people.
21 Made wrong decisions and ended up getting in trouble.

22 Q Did you try to go back to high school after that?

23 A It's after a while. I came back, tried to attend and
24 they didn't accept me back.

25 Q And why?

Bauta - direct - McElfish

1822

1 A Because they said I was gone too long.

2 Q Okay. All right. Now, after you came back, did you
3 begin to work?

4 A Yes.

5 Q And can you tell the jury what kind of work you were
6 doing after high school?

7 A Started off with security. I was doing security, quite a
8 few security jobs. Sometimes I was working with two companies
9 at one time. Had to make sure keep money in my pocket, make
10 ends meet, pay bills and stuff.

11 Q I want to break that down a little bit.

12 Over how many years did you work in security?

13 A About five to ten years, around there. All together.

14 Q And how many different security companies did you work
15 for?

16 A Burns, Majestic, Saratoga, EAP. Then there was another
17 one, I forgot which one it was. What was the name of it.

18 Q EAP?

19 A Yes, I mentioned that one.

20 Q Okay. All right. Now, during the time you worked for
21 security companies, did you have any type of licensure?

22 A Yes. I have a security license.

23 Q And what do you have to do to get that?

24 A I had to take an eight-hour course.

25 Q And when you say during that time you were working two

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1823

1 jobs at the same time, at times, what do you mean?

2 A One time I was working for Majestic and also for
3 Saratoga. One was paying less than the other, so I wanted
4 more money. So I started working another job just to keep
5 money.

6 Q Okay. And during the time after high school did you also
7 do odd jobs?

8 A Yeah.

9 Q Can you explain that.

10 A It really didn't matter what it was. It could have been
11 picking up some trash from somebody's yard; cleaning out their
12 attic. It didn't matter, as long as it was gave me money and
13 that's all that mattered to me.

14 Q Were you ever married?

15 A Say that again.

16 Q Were you ever married?

17 A No.

18 Q Now, there came a time after the security jobs after high
19 school that you moved?

20 A Yes.

21 Q And where did you move to?

22 A Upstate New York.

23 Q And can you tell the jury -- well.

24 First of all, where in Upstate New York did you go?

25 A Ogdensburg, New York.

Bauta - direct - McElfish

1824

1 MR. McELFISH: I think it's O-G-S-D-E-N-B-U-R-G.

2 Q Do you have a general year of when you moved up there?

3 A It's about 2003, 2004.

4 Q All right. And why did you move up there?

5 A Well, makes me smile all the time. I found a young lady
6 and I fell in love.

7 Q Okay. And when you got to Ogdensburg, did you go to work
8 up there?

9 A Eventually I started working, yes.

10 Q And where did you go to work in Ogdensburg?

11 A In a McDonald's.

12 Q And what position did you start with when you first began
13 to work?

14 A I started as a regular crew person.

15 Q What does that mean?

16 A Pretty much everybody's above you and you -- the
17 manager's above you, they put you in the positions where, you
18 know, where you're good at. And you do whatever they ask you
19 to do.

20 Q Like what?

21 A I was working in the grill area, in the front with -- for
22 the registers, taking orders; cleaning; hollowing the floors,
23 that's mopping and scraping the floors; cleaning the floors;
24 washing the walls. Anything they needed done, that's what I
25 did.

Bauta - direct - McElfish

1825

1 Q And during the times that you worked in McDonald's in
2 Ogdensburg, did you receive promotions?

3 A Yes, I did.

4 Q And tell the jury about that.

5 A I worked and worked. Eventually I realized and I found
6 out that there was openings for advancement. I eventually was
7 promoted to a crew trainer and then I kept working, kept
8 working, and then I ended up getting promoted to a swing
9 manager.

10 Q What's that?

11 A Swing manager is a manager that works any shift that's
12 open and if they need you there, that's the shift that you
13 work.

14 Q Did you work part-time or full-time?

15 A I started maybe, like, a few weeks as a part-time and
16 then full-time.

17 Q Okay. Now, did a problem arise in Ogdensburg?

18 A Yes.

19 Q And you got in trouble?

20 A Yes.

21 Q And you served time?

22 A Yes.

23 Q Five to eight months?

24 A Yes. About that, yes.

25 Q And after that, did you go back to work?

Bauta - direct - McElfish

1826

1 A About a month later after.

2 Q And tell the jury about that.

3 MR. McELFISH: Withdrawn.

4 Let me ask narrow questions here.

5 Q Mr. Bauta, after you came back, did you reapply for your
6 job at McDonald's?

7 A Yes.

8 Q And around the time you came back to work for McDonald's,
9 was that 2006?

10 A About, yes.

11 Q Okay. In 2006, when you went back to apply for your job
12 at McDonald's, what happened?

13 A The manager that I spoke to, I came in there and I asked
14 the manager, you know, would I be able to have my job back.
15 And they told me come back the following week.

16 I came back the following week. They had me fill
17 out application and I was hired. I was rehired.

18 Q And what were you hired as?

19 A As a crew person again.

20 Q So you started over?

21 A Yes.

22 Q You were willing to do that?

23 A I was willing to do it.

24 Q And from 2006, how long did you work at McDonald's after
25 that?

Bauta - direct - McElfish

1827

1 A It was about 2012.

2 Q And during that time, did you receive any additional
3 promotions or additional training?

4 A Yes.

5 Q Please tell the jury about that.

6 A I started over as a crew person and I didn't mind because
7 I -- I wasn't trying to, you know, get no special privileges.
8 Took me months, went back another promotion back to crew
9 trainer, and about a year later, I kept working, kept working,
10 and swing manager again. And then to a shift manager.

11 Q And for how long were you a shift manager again until you
12 were laid off?

13 A A few years.

14 Q Could you be more specific?

15 A About four. About four years.

16 Q Okay. Part-time or full-time?

17 A Full-time.

18 Q And you got laid off in 2012?

19 A Yes, correct.

20 Q Because why?

21 A I made a wrong decision.

22 Q Okay. Let me ask it this way.

23 Did you get laid off because the business was sold
24 to a new owner?

25 A Yes, correct.

Bauta - direct - McElfish

1828

1 Q Okay. All right. Now after that, in 2012, October of
2 2012?

3 A Yes.

4 Q Okay. This accident was in October of 2013. Were you
5 able to work between October of 2012 and October of 2013?

6 A On-the-books job, no. It was hard to find one. I
7 applied different places, but for the meanwhile, I was looking
8 for odd jobs, as I mentioned before, just making ends meet.
9 Kept myself busy and eventually this is what happened to me.

10 Q Okay. But during that year, can you give the jury an
11 idea specifically what kind of odd jobs you were doing to make
12 money?

13 A I did raking yards; taking out people's trash; anything.
14 It didn't matter. I'd walk around and if I see like a, like,
15 someone might need help in their yard, something like that,
16 might see a little sign that they need help cleaning,
17 whatever, and I go and question about it to see if they need
18 help and I helped them. If they say yes that they need help.

19 Q Okay. Did there come a time you moved back to Brooklyn?

20 A Yes.

21 Q Can you tell the jury why?

22 A Eventually I realized that I wasn't going to find a job
23 up in Ogdensburg because it's a small town, and odd jobs only
24 last for so long. So I decided something better. Move back
25 to Brooklyn, be closer to my kids and my family.

Bauta - direct - McElfish

1829

1 Q Now, during the time you were in Ogdensburg, you had two
2 girls?

3 A Yes.

4 Q And they were growing up?

5 A Yes.

6 Q And a son?

7 A Yes.

8 Q And during that 12 years, did you keep in touch with your
9 daughters?

10 A Yes, correct.

11 Q Can you please --

12 MR. McELFISH: Withdrawn.

13 Q Can you tell the jury their names?

14 A My oldest is Khadjha Smith and my youngest is Jailah
15 Smith. K-H-A-D-J-H-A, Smith. J-A-I-L-A-H, Smith.

16 Q Okay. Can you tell the jury how you kept in touch and
17 how you stayed close to your daughters?

18 A You know, when I was Upstate, I came down for their
19 birthdays; any special occasion; any, like, shows in school
20 that they had, like dances or whatever. But besides that, I
21 made sure I came down every two months. Took time off from
22 work and came down.

23 Q And did you get back to Brooklyn prior to the accident?

24 A Yes.

25 Q And how long were you in Brooklyn before the accident?

Bauta - direct - McElfish

1830

1 A A few months, maybe.

2 Q Okay. And during the time you got back, can you explain
3 to the jury --

4 MR. McELFISH: Withdrawn.

5 Q After you got back to Brooklyn, can you explain to the
6 jury, please, how much time you were able to spend with your
7 daughters then.

8 A Even more time. Didn't really see them too much during
9 the week because they had school. But I would see them like
10 maybe an hour or so during the week. But eventually the
11 weekends, it was pretty much our weekends. I would take them,
12 go maybe for dinner, movies, whatever; just spend time with
13 them.

14 Q And that happened when you got back in 2012; right?

15 A Yes.

16 Q And do you still see them as much since 2012?

17 A Right now I still see them, but there's always, like,
18 change of plans, because sometimes we'll have plans and I will
19 wake up and I'll either be in pain, sore, and I will let them
20 know, like, we have to change our plans, maybe tomorrow, if I
21 feel better and I have this every once in a while.

22 MR. McELFISH: Hold on a second, please.

23 MR. BARMEN: Side-bar, Your Honor?

24 THE COURT: Sure.

25 (Side-bar conference held on the record out of the

Side-Bar

1831

1 hearing of the jury.)

2 (Side-bar.)

3 MR. BARMEN: I want to get ahead of this before we
4 go too far. They dropped any claim that the accident impacted
5 the relationship with the daughters. You remember the issue
6 with the text messages, they were never produced because they
7 indicated they were dropping that claim.

8 So I just want to make sure we're not going to run
9 afoul of any prior issues that we had and the prior agreement
10 that we had with the withdrawal of that claim. Because,
11 ultimately, those text messages you ordered produced, were
12 never produced because he withdrew that claim.

13 MR. McELFISH: I have no idea how that's relevant to
14 what we've been discussing. It's just background. I know
15 he's going to cross-examine on him being a bad dad and all of
16 that. So basically I'm not asking, you know, for -- in fact,
17 it's the opposite. If he's listening to the evidence, the
18 opposite is true that he doesn't have -- he's not prevented
19 from seeing his daughters. He doesn't have a claim that he
20 can't see his daughters because of the accident. He's
21 basically saying he tries to see them as much and his life is
22 changing. And that's important in light of these convictions
23 coming in. His life is changing. He's raising his kids and
24 moving on.

25 MR. BARMEN: Well, this was more a prophylactic type

Side-Bar

1832

1 of side-bar because it sounded like it was going that
2 direction. If it's not, it's not. But I want to remind the
3 Court, in particular, of that issue and the withdrawal of the
4 claim.

5 THE COURT: Are you asking me to make any ruling
6 now?

7 MR. BARMEN: No, I just want to make sure that we're
8 not going to run afoul. You can't put that Jeannie back in
9 the bottle, Your Honor, is all I am saying.

10 THE COURT: If he takes the Jeannie out of the
11 bottle, then we will figure it out.

12 MR. BARMEN: Thank you.

13 THE COURT: Okay, continue.

14 (Side-bar end.)

15

16

17 (Continued on following page.)

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21

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24

25

Bauta - direct - McElfish

1833

1 BY MR. McELFISH: (Continuing)

2 Q Now, Mr. Bauta, when you came back from Ogdensburg to
3 Brooklyn, where did you get a place to live?

4 A When I came back, I was staying with my dad.

5 Q Did you, when you came back, did you move somewhere from
6 your dad's place to another place?

7 A Yes, I did.

8 Q And where was that?

9 A 94 Moyer in Williamsburg.

10 Q Okay. And who did you live with there?

11 A A young lady named Margaret Leung.

12 Q And how did you know her?

13 A I knew her through my sister.

14 Q Which one?

15 A Selenia Rivera.

16 Q Okay. And what did you have there at that place? Did
17 you have half a house or a floor or a room? Can you describe
18 it?

19 A Just a bedroom which I rent from her.

20 Q Now, let's go to the night of the accident, sir, and I'm
21 going to ask you some more narrow questions about that.

22 Do you recall -- first of all, just generally, do
23 you recall the night of the accident going to Port Authority?

24 A Yes, I do.

25 Q Okay. And you boarded a bus there at Port Authority?

Bauta - direct - McElfish

1834

1 A Yes.

2 Q And where were you going?

3 A To Cleveland.

4 Q And why were you going to Cleveland?

5 A I met a lady and had feelings for her and so I wanted to
6 go see her.

7 Q And what happened to your girlfriend in Ogdensburg?

8 A That was Cleveland.

9 Q Okay. All right. And when you got -- when you went to
10 Port Authority, did you get on a Greyhound bus?

11 A Yes, I got on.

12 Q And where in the bus were you seated?

13 A It was, like, the -- like, towards the middle, the back,
14 behind the driver's side.

15 Q Do you recall, just if you would, yes or no, do you
16 recall when the accident took place?

17 A Yes.

18 Q And what did you observe in front of you when the
19 accident took place?

20 MR. BARMEN: Objection.

21 THE COURT: Overruled.

22 A In front of me was the tractor trailer coming through the
23 windshield.

24 Q And do you have trouble with that memory?

25 A Yes.

Bauta - direct - McElfish

1835

1 Q Is that something that you, that visits you or you
2 remember often?

3 A There was times where I was actually able to see what
4 happened with my eyes open clearly.

5 Q After you saw that, Mr. Bauta, what happened to you and
6 your body inside the bus?

7 A I flew from my seat to the front seat and the side of my
8 head connected to a metal handrest.

9 Q What happened next?

10 A Somehow I ended up outside the bus, I don't remember how,
11 and I was outside of the bus. It was, like, just craziness,
12 kind of like a war zone. Just lights every where,
13 helicopters.

14 Q Mr. Bauta, there's been reference throughout the trial
15 about perhaps you climbing through a window. Do you remember
16 that?

17 A No, I don't.

18 MR. McELFISH: Okay. Now, Your Honor, what I would
19 like to do is I'd like to show the witness, counsel and the
20 Court an exhibit without audio, small screens only.

21 MR. BARMEN: What are we showing, Counsel?

22 MR. McELFISH: 144.01.

23 MR. BARMEN: Objection, Your Honor. This is what we
24 talked about.

25 MR. McELFISH: Foundation.

Bauta - direct - McElfish

1836

1 THE COURT: Sustained.

2 Q Can you describe for the jury what you saw outside the
3 bus, please, just in general?

4 A Just people running everywhere, screaming, smoke, lights,
5 helicopters, just pretty much a nightmare.

6 Q Do you recall emergency personnel either --

7 THE COURT: Sustained. Leading.

8 Q What lights do you recall at the scene?

9 A Fire trucks, ambulance, helicopters, other vehicles that
10 were there, big spot lights.

11 Q Okay. Once you were outside the bus, Mr. Bauta, what
12 happened next?

13 A At one point, I was asked by either EMT or EMS, I'm not
14 sure, to help them with a body that was on the floor, on the
15 ground, I should say.

16 Q Where on the ground was she?

17 A It was, like, some feet, some yards behind the bus.

18 Q In the roadway or somewhere else?

19 A Right in the middle of the road.

20 Q And what did the EMT say to you?

21 A He yelled and pointed at me and said, You come here. He
22 asked me if I could help him turn over the body. He was
23 squatting by, squatting down by her head and he told me to
24 just grab her by the ankles, so I squatted down by her ankles
25 and he asked me if I had a strong stomach for this and I, I

Bauta - direct - McElfish

1837

1 was, like, just, let's just do it.

2 I turned them over, I mean, turned her over,
3 couldn't even tell what she looked like. Her face was so
4 swollen, covered in blood, can't tell where the blood was
5 coming from, just her whole face and her head covered in
6 blood, the blood running on the ground.

7 Q What do you recall at that time about what the EMT was
8 doing?

9 A He tried to revive her but he really didn't have to tell
10 me that she was gone because I -- she didn't look like she was
11 breathing.

12 Q And for how long were you seeing this and next to this,
13 these events?

14 A It was a few minutes. I can't really say exactly how
15 many minutes but it was a few minutes.

16 Q Mr. Bauta, what happened after that?

17 A At some point, I was, I was, spoken to some EMS people, I
18 don't remember the conversation or anything like that. I
19 pretty much just ended up in the hospital. Sooner or later, I
20 ended up in the hospital.

21 Q Do you recall any pain you had when you were at the scene
22 of the accident?

23 A I can't really tell if I had pain because my adrenaline
24 was, if I pronounced it right, I believe it was so high that
25 couldn't feel nothing.

Bauta - direct - McElfish

1838

1 Q Do you recall any injury or blood or laceration to your
2 head?

3 A I didn't know until I was told.

4 Q What's the next thing you remember?

5 A I woke up in the hospital in a bed. There was a
6 gentleman standing next to me. I didn't know who he was. I
7 just remember a round hat, shiny badge. So it was law
8 enforcement. The conversation with him, I don't remember, but
9 I'm sure I spoke to him if he was there. Then I was being
10 rolled from room to room. What exams they was taking, I don't
11 remember. Eventually I ended up in a big room with a whole
12 bunch of people that was passengers. There was some tall
13 gentleman stating that he was from Greyhound, passed out some
14 papers, everybody started signing them. I was later ended up
15 getting a ride back to Port Authority.

16 Q And who got you the ride?

17 A Not really sure.

18 Q Did Greyhound arrange for it?

19 A Most likely.

20 Q Okay. Do you know what the papers were that they were
21 passing out if you recall?

22 MR. BARMEN: Objection.

23 THE COURT: Do you know what the papers were,
24 Mr. Bauta?

25 THE WITNESS: No.

Bauta - direct - McElfish

1839

1 Q And at some point, you got back to New York City, to Port
2 Authority?

3 A Yes.

4 Q And do you recall generally how long after these events
5 it was that you got back?

6 A It was hours later. I don't know how many hours.

7 Q When you got back to Port Authority, what did you do?

8 A Met with a dark skinned lady. She was affiliated with
9 Greyhound. We sat in a room, she was talking something, I
10 don't remember exactly what she was saying, asked for names
11 and then she started mentioning something about getting
12 everybody to where they wanted to go, to the designations they
13 wanted to go. I don't know, it just seemed kind of -- I
14 didn't feel right.

15 Q What happened next?

16 A I called a buddy of mine at the time to come get me and
17 he came and got me.

18 Q What was his name?

19 A His name is Simon.

20 Q And where did he take you?

21 A He took me straight home.

22 Q And what happened when you got home?

23 A I went to sleep eventually until the next day.

24 Q And what happened the next morning?

25 A I woke up and I felt like I got hit by a bus, like, my

Bauta - direct - McElfish

1840

1 body was so sore and it hurt to move, anything, so I called
2 Simon again and asked him to take me to the hospital.

3 Q And did he do that?

4 A Yes.

5 Q And where did you go?

6 A To Brookdale Hospital.

7 Q And what did you tell them you were feeling?

8 A Pretty much just told them, like, my whole body hurts.
9 Like, they was, what part? I said my whole body, like, head,
10 dizzy, my arm, my right leg. They asked me what happened and
11 I told them I was in an accident and that's when they, they --
12 I don't really remember exactly everything that night, but
13 eventually they prescribed me some medication for pain, muscle
14 relaxers. It was daytime when I got there. I left out of
15 there like late in the evening sometime and I went and ended
16 up going home after that.

17 Q Did you fill the prescriptions for the medication that
18 they gave you?

19 A Yes, I did.

20 Q And where did you do that at?

21 A The Walgreens.

22 Q And when you got back home, what did you do next?

23 A I tried to relax but it was hard to relax.

24 Q And this is the day you came back from Brookdale
25 Hospital?

Bauta - direct - McElfish

1841

1 A Yes.

2 Q Tell the jury what kind of pain you were having and
3 where?

4 A It was horrible pain, just pain I never experienced
5 before. Had hurting, kind of dizzy and my back, my right knee
6 and shin, my elbow, my left elbow, and that's when I started
7 feeling the back pain.

8 Q Where in your back was it, Mr. Bauta?

9 A From my lower back shooting down the back of my right
10 thigh down just above my knee.

11 Q Are you okay right now to continue?

12 A I'm kind of sore but, I mean, what can I do?

13 Q Okay. After you woke up in pain that day after
14 Brookdale, what did you do next?

15 A I woke up to a phone call. I couldn't really speak. I
16 did most of the hearing in the phone call. It wasn't a long
17 phone call. It was pretty short. I hung up and laid back
18 down and kind of, like, trying to figure out why the phone
19 call, why was the phone call for.

20 Q Who was the phone call from?

21 A From someone from Greyhound.

22 Q And what was that person's name?

23 A Jessica.

24 Q And at the time, Mr. Bauta, did you record and write down
25 her name and phone number?

Bauta - direct - McElfish

1842

1 A Yes, I did.

2 Q Did you keep that information?

3 A Yes, I did.

4 (Continued on next page.)

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Side Bar

1843

1 Q And to your best recollection, what is it she was wanting
2 from you?

3 MR. BARMEN: Objection. Side bar, Your Honor.

4 THE COURT: All right.

5 (The following occurred at side bar.)

6 MR. BARMEN: Well, there's a couple of issues with
7 this. Number one, it's going to get into claims stuff because
8 Greyhound is self-insured for the first certain amount of
9 money. Number two, and it's as great a concern for me right
10 now, this witness has just testified he's got information that
11 was never produced in discovery, never disclosed and it's the
12 first time it's ever been mentioned and this guy has been
13 deposed three different times. There's at least two sets of
14 discovery requests in the interrogatories sent and apparently
15 now he's kept information, notes, communications with
16 Greyhound that have never been produced. I don't think
17 they're listed in any, certainly not in the Rule 16 or we
18 would have requested it or made an issue of it because it's
19 never been previously disclosed.

20 MR. McELFISH: So, even though the defendants
21 deposed Mr. Bauta three times, they never once asked him
22 anything about the week from the time he got out of
23 Brookdale -- there's a gap in the deposition from the time he
24 got out of Brookdale until he went to the doctor seven days
25 later. They didn't ask him if any of these things happened.

Side Bar

1844

1 I have no intention of offering the paper that it was on. I'm
2 moving on. I don't intend to admit it, but it certainly goes
3 to the -- they've been trying to throw him under the bus since
4 day one. He had a lawyer early on in the case. All he's
5 going to say, Judge, is because I received the phone calls, I
6 felt like I needed someone to sort of counsel me through that
7 issue and that's it.

8 MR. BARMEN: It was never --

9 MR. McELFISH: They opened the door.

10 MR. BARMEN: It was never questioned in deposition
11 because our written discovery requests would have asked for
12 any communications and they were produced. So because it
13 wasn't produced, I don't see there would have been a reason to
14 ask for that type of information. Just because it wasn't
15 asked in deposition doesn't mean they had no obligation to
16 produce it in response to proper interrogatories and requests
17 for production of documents that were sent.

18 MR. McELFISH: Let me give you an example, Judge.

19 MR. BARMEN: No. No.

20 MR. McELFISH: This will actually prove my point.

21 Not only did they not ask how he felt after he got
22 out of Brookdale, not only did they ask what he did in the,
23 not only did they ask if you went to your sister's house --

24 THE COURT: Did they ask in discovery for any
25 identifying communications between, that he received from

Side Bar

1845

1 Greyhound?

2 MR. McELFISH: I don't remember anything like that
3 honestly.

4 MR. BARMEN: The standard request, communications
5 between parties. I can pull it out.

6 MR. McELFISH: I mean, they've opened the door to
7 the lawyer issue. They're trying to dirty him up on the idea
8 that he ran to a lawyer to get a doctor and the fact it --

9 THE COURT: If the whole purpose of this is to show
10 that he, based on this phone call, that he sought legal
11 advice, jump to that.

12 MR. McELFISH: I will.

13 THE COURT: Jump to it quick.

14 MR. McELFISH: I'll take a narrow question on that
15 if it's okay.

16 THE COURT: And don't be specific about what she
17 said and anything like that.

18 MR. McELFISH: I'll just do a narrow question on
19 that.

20 THE COURT: No. You didn't identify -- look --

21 MR. McELFISH: No, Judge, you misunderstood me. I'm
22 not going to do a narrow question on what the communications
23 were. I'm going to do a narrow question of him getting legal
24 advice because of the phone call and leave it.

25 THE COURT: All right. (Continued on next page.)

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1846

1 (continuing.)

2 MR. McELFISH: Proceed?

3 THE COURT: Yes.

4 BY MR. McELFISH:

5 Q Mr. Bauta, I'm going to ask you a narrow question here;
6 did you receive more than one phone call from Greyhound?

7 A Yes, correct.

8 Q All right. And as a result of these phone calls, did you
9 elect to retain a lawyer?

10 A Yes.

11 Q And his name was Doug Colbert?

12 A Yes.

13 Q And you did that within a couple of days of the accident?

14 A Yes.

15 Q After the phone calls?

16 A That's correct.

17 Q Okay. Now, with respect to your injuries, what did you
18 do with respect to your injuries -- withdrawn.

19 Did you see your sister within a day or so of the
20 accident?

21 A Yes, I did.

22 Q And how did that take place?

23 A She came by to just to see me and when I walked out she
24 was looking at me weird and the first thing she asked was, why
25 are you walking so slow? What's wrong with you, and I kind of

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1 didn't want to tell her, but I did. Then, like, some hours
2 later -- excuse me, she let me know that she found a place
3 where I can go and get help for my pain and everything.

4 Q And do you know -- withdrawn.

5 When you went to your sister's -- you're talking
6 about Maria; correct?

7 A Correct, yes. I'm sorry.

8 Q Did Selenia and Martin also see you that day?

9 A I know Martin was there. I don't remember if my sister
10 Selenia was there.

11 Q And where did your sister refer you to?

12 A To 110 34th Street in Manhattan.

13 Q And do you know how she knew that location?

14 A No, not really.

15 Q Okay. When was your first appointment to go there?

16 A It was some days later, about -- about or three maybe.

17 Q If I said October 16th, about seven days post-accident,
18 would that be correct?

19 A About, yes.

20 Q And what were your pain levels between the time you left
21 Brookdale until you went to the 110 West 34th Street location?

22 A It was just getting worse.

23 Q And can you give the jury an idea of the severity?

24 A My right leg, I started losing feeling in it. My back,
25 it just started getting worse. It started -- my head started

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1 hurting even more and it was to a point where I couldn't stand
2 the light or loud noise.

3 Q And who did you see there at 110 West 34th Street on the
4 first visit?

5 A It was Adelle.

6 Q And who is she?

7 A She's a physical therapist.

8 Q And what did she do for you?

9 A She asked some questions; how are you feeling, where is
10 the pain, what can I do for you, and stuff like that and I
11 explained the most I could, but then she did some -- I don't
12 know exactly what it's called, like, electro pads for my back
13 and on my neck and she iced my leg. She put ice on my elbow
14 and she kept asking me how I'm feeling the whole time I was
15 there and then she referred me to another doctor.

16 MR. McELFISH: 30-0006 for ID only, small screens.

17 Q I would like you to take a look at the small screen,
18 Mr. Bauta. Is that a photograph of your head after the
19 accident?

20 A Yes, it is.

21 Q Does it accurately and correctly represent what it looked
22 like within a day or two of the accident?

23 A Yes, it does.

24 MR. McELFISH: The plaintiff moves to admit and
25 publish.

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1849

1 THE COURT: Objection?

2 MR. BARMEN: No objection.

3 THE COURT: This is 300-0006. Received in evidence.

4 (Plaintiff's Exhibit 300-0006 received in evidence.)

5 (Exhibit published.)

6 MR. McELFISH: 300-0008 for ID. Small screens, and
7 to avoid any objection --

8 MR. BARMEN: I don't see it yet. It's not up.

9 MR. McELFISH: It's in the books, though.

10 MR. BARMEN: Well, I mean --

11 MR. McELFISH: We'll go back to small screens.

12 We'll just have to go back and forth.

13 THE COURT: Hold on.

14 MR. BARMEN: Now I see it. Thank you.

15 MR. McELFISH: Any objection?

16 MR. BARMEN: No objection.

17 MR. McELFISH: The plaintiff moves 300-0008 in
18 evidence.

19 THE COURT: Received.

20 (Plaintiff's Exhibit 300-0008 received in evidence.)

21 MR. McELFISH: Permission to publish?

22 (Exhibit published.)

23 MR. McELFISH: Small screens, please.

24 THE COURT: Small screens are on.

25 MR. McELFISH: 300-0009, 300-0010 for ID. Plaintiff

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1850

1 moves to admit.

2 THE COURT: Any objections?

3 MR. BARMEN: No objection.

4 THE COURT: Received.

5 (Plaintiff's Exhibits 300-0009 and 300-0010 received
6 in evidence.)

7 MR. McELFISH: Plaintiff moves to publish.

8 (Exhibit published.)

9 BY MR. McELFISH:

10 Q Mr. Bauta, what's on the screen right now?

11 A That's my left elbow.

12 Q And what's that one?

13 A Left elbow.

14 Q 0009. What's that one?

15 A Right side of my head.

16 Q Okay. Now you mentioned that Adelle at 110 West 34th
17 Street referred you to another doctor. Do you recall who that
18 was?

19 A It was a chiropractor. I can't pronounce the name. It
20 starts with an M.

21 Q McGowan?

22 A Yes.

23 Q Do you recall what it was that she did for you?

24 A She was a chiropractor. She tried to work on me, but
25 instead she requested some X-rays because she was kind of

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1 hesitant on touching me because I was in so much pain.

2 Q And after Dr. McGowan, did you see another doctor?

3 A Yes.

4 Q And who did you see?

5 A It was -- it was Dr. Winn.

6 Q Okay. Do you remember when you saw Dr. Winn?

7 A It was like Thursday -- it was a Thursday. I don't
8 remember exactly.

9 Q Okay. Did you memorize all of your doctor's appointments
10 today for your testimony?

11 A No.

12 Q Do you know what kind of a doctor Dr. Winn is?

13 A Pain management.

14 Q Did you also see a Dr. Lebowitz and a Dr. Capiola?

15 A Yes.

16 Q And did you also see a Dr. Russo?

17 A So many doctors. I couldn't keep up with the names.

18 Q And do you recall what it was that Dr. Winn was doing for
19 you?

20 A He was examining my back, the pain. He was examining the
21 exercises that my chiropractor had requested. He was showing
22 me all the -- I don't know how to say it. It's like the --
23 the misplaceness (sic) of my discs and everything.

24 Q Do you recall seeing a Dr. Debra Goldman, a psychologist?

25 A Yes.

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1852

1 Q And do you recall if that was the same day that you saw
2 Adelle or Dr. McGowan?

3 A I don't know if it was the same exact day but it was
4 within that week I'm sure.

5 Q And what complaints did you make to Dr. Goldman?

6 A I'm just not myself. I need somebody to talk to.

7 Q Did you tell her about the events of the accident
8 including the tractor trailer coming through the window?

9 A Yes, I did.

10 Q The windshield, I should say.

11 A Yes.

12 Q Did you tell her about the events involving Ms. Hoang on
13 the Greyhound?

14 A Yes, I did.

15 Q And did you continue to see Dr. Goldman on and off for
16 about a year?

17 A Yes, I did.

18 Q And what things was she doing for you during that period
19 of time?

20 A Just me talking, just trying to help me open up, get some
21 stuff off of my chest that was just -- it felt like it was
22 just putting pressure on me and kind of just, you know, kind
23 of give me hope.

24 Q Were you having issues from the accident and what you had
25 seen and experienced?

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1 A Yes, I had. The very next day from the accident I sat in
2 my room with my lights on, my door closed and I sat on my bed
3 and looked towards my window and I could see clear as day the
4 tractor trailer coming through the windshield and I thought I
5 was reliving it again.

6 Q Did you also within a week of the accident see a physical
7 therapist by the name of Dr. or RPT Vincent Vasile?

8 A It was Dr. -- I mean, their names -- I don't remember all
9 of their names.

10 Q Do you remember a Dr. Gutstein? He was a neurologist.

11 A Probably. I seen quite a few doctors over there on 34th
12 Street, but their names -- I just don't remember all of their
13 names.

14 Q By the way, when you went to West 34th Street the first
15 time, did they ask you to sign a lien?

16 A Yes.

17 Q And did they understand at that time that you had an
18 attorney?

19 A Not until I asked -- not until they asked me and I told
20 them.

21 Q Do you understand a lien is a charge that you'll be
22 obligated to pay?

23 A Yes.

24 Q At that time, Mr. Bauta, did you have a regular doctor
25 that you went to?

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1854

1 A No.

2 Q And if you needed medical care back in October of 2013,
3 whether it was from an accident or not, where would you go?

4 A To the hospital.

5 Q Brookdale?

6 A Yes, correct. Sorry.

7 Q Now, you mentioned that Dr. McGowan had ordered an X-ray.
8 Do you understand that to be an MRI as well?

9 A No, I didn't know that.

10 Q Within a few weeks of the accident, did you get in one of
11 those tubes where they put you in the tube and take pictures?

12 A Yes.

13 Q Do you recall the name of that facility?

14 A Something Image.

15 Q Precision?

16 A Yes.

17 Q And during the time you were seeing Dr. Russo and
18 Dr. Gutstein and Dr. Capiola and Dr. Lebowitz, can you tell
19 the jury, please, what types of injuries and pain you were
20 having at that time?

21 A Dizziness, blurry vision, my right leg, my knee, my shin,
22 the pain radiating from my back down the back of my leg.
23 Sometimes it just felt like it was fire. I had some pain in
24 my elbow, but it wasn't a major thing. My main concern was my
25 back because it started getting worse and worse.

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1855

1 Q I want to go back to Dr. Winn just briefly. Now, did
2 Dr. Winn -- did he do some injections for you?

3 A Yes, he did.

4 Q And do you remember how many he did?

5 A It was more than five.

6 Q And do you remember what they were for?

7 A The pain and swelling in my spine.

8 Q And where were those injections done?

9 A It was a facility in New Jersey.

10 Q Okay. And you went out there -- withdrawn. When you
11 went out there, did you have to undergo anesthesia with an IV
12 prior to those proceedings?

13 A Yes, correct.

14 Q I'm sorry, prior to those procedures.

15 A Yes, correct.

16 Q And those procedures were over about what period of time,
17 generally?

18 A It's about a few months, weeks in between.

19 Q And can you tell the jury and we'll try to do them
20 together but did they generally help you?

21 A In a way, it kind of, but it was just for, like, a week.
22 Like, I would get them on a Sunday and then by Saturday I'm in
23 pain again.

24 Q And specifically where is the pain that it helped and
25 where did it come back?

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1856

1 A It was for my back down to my leg.

2 Q And are we talking right side, just to be clear?

3 A Yes, my right leg, yes.

4 Q Now, sometime in February of '14, did you have a fall?

5 A Yes, I did.

6 Q And can you explain that?

7 A I was walking and I tried to step over a snow bank
8 leaning on my left leg and I lost strength in my right leg and
9 I fell.

10 Q And did you have a cane with you that day?

11 A No, I don't.

12 Q And did you begin to use your cane more often after that?

13 A Yes, I did.

14 Q After all of the injections with Dr. Winn and after the
15 all the physical therapy and chiropractics, did you go to see
16 a surgeon?

17 A Yes, I did.

18 Q Do you recall his name?

19 A It was Dr. Cordiale.

20 Q Do you know who referred you?

21 A No, I don't. I don't remember.

22 Q All right. And did you ever go see Dr. Lattuga?

23 A At the moment I thought it was his name because that was
24 on the business card they gave me.

25 Q Who was it actually?

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1857

1 A I don't remember his name, but his name was on the card.

2 Q I see. Would it refresh your memory if it was
3 Dr. McEllis?

4 A That was one of the names on the card, on the business
5 card, yes.

6 Q And after that, did you see Dr. Cordiale?

7 A Yes, I did.

8 Q And do you recall approximately when it was when you went
9 to see Dr. Cordiale?

10 A A year or so after the accident.

11 Q And where was Dr. Cordiale located?

12 A I don't know the exact address but it's in Manhattan on
13 59th Street.

14 Q And how did you get there?

15 A By subway.

16 Q Do you drive, Mr. Bauta?

17 A No, I don't.

18 Q Do you rely on public transportation?

19 A Yes.

20 Q Just stepping back, you understood when you did the five
21 injections under anesthesia with Dr. Winn that there were
22 risks associated with those procedures?

23 A Yes, correct.

24 Q But you decided to have them anyway?

25 A I had to try something because my pain was getting too

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1858

1 bad.

2 Q And during the time just prior to going to Dr. Cordiale,
3 were you taking medication?

4 A Yes.

5 Q Can you tell the jury what you were taking, please?

6 A I was taking Percocet.

7 Q And who prescribed that?

8 A Dr. Winn.

9 Q And how often were you taking Percocet?

10 A I was taking it as prescribed at the moment.

11 Q Do you remember how often?

12 A It was every eight hours.

13 Q Do you remember what dosage?

14 A I think it was 250.5, something like that.

15 Q And how did that medication -- well, first of all, did it
16 help you?

17 A It kind of did, but I don't -- I'm not a medicine kind of
18 person, like taking drugs and stuff, so --

19 Q Well, did it have side effects that bothered you?

20 A Yes, it did.

21 Q And what were those?

22 A Just made me sleep a lot.

23 Q And just going back from the time of the accident up
24 until you saw Dr. Cordiale, did the accident have an effect on
25 your daily living activities?

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1859

1 A Yes, it did.

2 Q And can you tell the jury how, please?

3 A I wasn't myself anymore. My life changed for the worse.
4 I was always very athletic and always on the go. I didn't
5 like to stay at home, I like sports. Doing laundry is hard.
6 Cooking is hard trying to stand by the stove to cook. I had
7 to constantly sit down. Grocery shopping was horrible.
8 Because, like, if I was want to go grocery shopping I have to
9 be really, really specific what I'm going to get. I can't
10 just go and fill up my fridge; pick up stuff that's not heavy.

11 I have to get the laundry -- after I do my laundry
12 and I have to wait for the driers that are up top because I
13 can't bend down and it takes time also because other people
14 will be using those driers.

15 Q Did you have weakness in your right leg when you went to
16 sees Dr. Cordiale?

17 A Yes, I did.

18 Q And what did Dr. Cordiale do for you when you went to see
19 him in or around December of 2014?

20 A He sat me down and he asked me about my pain and
21 everything, what do I feel and everything. He requested an
22 MRI and a CAT scan and when I got the discs for the MRIs and
23 the CAT scans, I brought them back and he showed me exactly
24 what's wrong and he showed me the discs that are out of place
25 and he explained to me the risks of the surgery and he was

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1860

1 specific for everything and at the end of the day, he gave me
2 the decision, he left it up to me to decide whether I want to
3 go with the surgery or not.

4 Q Now, you began seeing Dr. Cordiale in December of 2014.
5 You saw him a number of times prior to the surgery?

6 A Yes.

7 Q Can you give the jury an idea over that, say, six-month
8 period how many times?

9 A Quite a few. I was seeing him like every -- pretty much
10 like every month I was seeing him.

11 Q And did you discuss the surgical option at almost --
12 withdrawn. Did you discuss a surgical option at every visit
13 for six months?

14 A We discussed it. I had questions because I wanted to
15 know just in case that was the route that I wanted to go, but
16 he made it clear that if I don't want it he's not going to do
17 it. He's not going to force me, but he just kept checking me
18 to see where I -- the way I'm feeling and stuff like that, the
19 process, you know, see if I'm getting better or worse or
20 whatever the case was.

21 Q Well, what was the case? That's what I wanted to ask
22 you. From the time you started seeing Dr. Cordiale until you
23 elected for the surgery, how did your pain -- did it improve
24 or get worse?

25 A It got worse.

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1861

1 Q And how did the strength or weakness in your leg improve
2 or get worse?

3 A It got to the point where I pretty much struggled to walk
4 up the steps because when you're walking up the steps one leg
5 at a time and when I see put the pressure on my right leg, it
6 hurts. I can feel it all in my back.

7 THE COURT: Ladies and gentlemen, we are going to
8 take a midmorning break. We will come back in 10 or 15
9 minutes.

10 (Jury exits.)

11 (Recess taken.)

12

13 (Continued on the following page.)

14

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17

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25

Bauta - direct - McElfish

1862

1 (Continuing)

2 (In open court.)

3 (Judge RAMON E. REYES enters the courtroom.)

4 (The following occurs outside the presence of the
5 jury.)

6 THE COURT: Yes, Mr. Bauta, please come up and take
7 a seat.

8 (Witness resumes stand.)

9 (Jury enters.)

10 THE COURT: You can stay seated, Mr. Bauta.

11 You may be seated.

12 You may continue, Mr. McElfish.

13 MR. McELFISH: Thank you, Your Honor.

14 DIRECT EXAMINATION (Continuing)

15 BY MR. McELFISH:

16 Q Now, Mr. Bauta, did you eventually decide to have the
17 surgery?

18 A Yes, eventually.

19 Q And where did you have it done at?

20 A It was a hospital in Long Island.

21 Q Okay. And can you tell the jury how long you were in the
22 hospital for?

23 A I first got there, I was there for about a little over a
24 week. Had the surgery. Then the day that I was going to be
25 discharged, I had a second surgery.

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1863

1 Q And do you recall how the second surgery came about?

2 A I didn't feel right when Dr. Cordiale came in to check on
3 me, as he did every day. He came in to tell me that I was
4 going to be discharged, that I could go home. And I was like,
5 I don't feel right. Something just doesn't feel right.

6 He said what do you feel? And I told him that it
7 felt like I had something sharp, like one of the rods were,
8 like, trying to rip out of my skin and my left leg was numb.

9 Q And what did he do -- what did he do at that point?

10 A He requested for me to have MRI. And after the MRI, he
11 let me know that I will be having a second procedure.

12 Q Did that happen immediately?

13 A Yes.

14 Q Okay. So how long, all together, with both surgeries,
15 were you in the hospital?

16 A Almost three weeks, about.

17 Q And after the surgery and you were able to get up and
18 about, how did you feel?

19 A Sore. Tight. Uncomfortable. It was -- at that point,
20 it was a complete different pain.

21 Q Can you explain?

22 A Like, the -- when I had the surgery, the pain radiated
23 down my leg, didn't feel it. Still had a numbness in my left
24 leg, result of the -- what he told me what happened was one of
25 the rods shifted and I had fluid building, pressing against

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1864

1 one of my nerves, that was pressing against my nerve that was
2 -- was taking up all the pain -- I mean, not the pain, but all
3 the feeling out of my left leg. Like, I could squeeze my leg
4 and I couldn't feel nothing.

5 But besides that...

6 Q Was the weakness in your right leg gone?

7 A Not 100 percent.

8 Q Can you give the jury an idea of the difference.

9 A I couldn't -- if I just stand on one leg, I couldn't do
10 it before. But then, eventually, I was able to do it, but not
11 as long.

12 Q And was there any change in the back pain after the
13 surgery?

14 A Yeah, there was pain. I mean, there was pain. It was
15 because my muscles were cut open. It was new bone forming.
16 The muscles were reforming also. It was more of healing pain,
17 which was, felt muscle spasms. Like somebody poking a needle
18 in my back. It was uncomfortable, but Cordiale explained
19 everything beforehand, what exactly I would be feeling and
20 that's exactly what I was feeling.

21 Q Did the pain running down the leg, as opposed to, say,
22 for instance, the weakness, did that go away after the
23 surgery?

24 A Yes, it did.

25 Q And does your right leg now -- is the pain going down

Bauta - direct - McElfish

1865

1 your right leg now gone?

2 A Yes, it's gone.

3 Q You continued to see Dr. Cordiale after the surgery on
4 and off?

5 A Yes, I do.

6 Q And how often did you see him from the time of the
7 surgery in May of 2015, until the present, which we're in
8 May of '18?

9 A Not exactly sure exactly how many times, but I've seen
10 him quite a few times. It was like every month or every few
11 weeks. I'll go there and when I finish seeing him, he'll have
12 a next appointment, a follow-up appointment, scheduled for me.

13 Q Now, Mr. Bauta, do you have an understanding as to the
14 metal and screws that have been put in your back?

15 A Yes. From what I was told, yes.

16 Q Do you know how many?

17 A It started with six and at the present moment, I have
18 five.

19 Q And have you --

20 MR. McELFISH: Withdrawn.

21 Q Do you feel that you have been improving, let's start
22 with your back, since the surgery?

23 A Slowly but surely. I'm still not the same person. I
24 still have trouble bending, walking long distance, from -- big
25 difference from when I used to walk long distance; two to

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1 three hours just nonstop walking. Now it's half-hour,
2 45 minutes, maybe an hour tops without -- before I start
3 feeling pain.

4 Walking up and down steps. Hopefully there's not a
5 crowd that they'll bump into me and I'll -- I get scared when
6 somebody's behind me, because I'm scared they'll bump into me.

7 Q Are you afraid of additional surgery?

8 A Yes.

9 Q Now, you said the pain in your right leg was gone right
10 after the surgery.

11 Did the weakness in your right leg eventually
12 improve since the surgery?

13 A Still not 100 percent, but it is improved.

14 Q And the weakness in your left leg, from the complication,
15 has that improved?

16 A Yes.

17 Q Has that gotten back to normal in your left leg?

18 A Not necessarily, but it's better than what it was.

19 Q And going back, did you have neck pain from this
20 accident?

21 A Yes, I did.

22 Q And did you treat for your neck pain along with your back
23 with all of the doctors we've discussed?

24 A Not all. But, yes, I did. Chiropractors checked my
25 neck, physical therapist and Cordiale checked my neck.

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1867

1 Q All right. And do you have neck pain as you sit here
2 today?

3 A I can't turn all the way to either side and if I try, I
4 can feel the stiffness. But it's not as bad as it used to be.

5 Q Okay. And do you have back pain as you sit here today?

6 A Yes, pretty sore right now, actually.

7 Q Do you have any kind of leg pain or issues with your leg?

8 A Not at the moment, no.

9 Q And the jury has seen that you use a cane. Can you
10 explain why you do that?

11 A It's more for back support. You know, especially if I'm
12 going down to the City to see my doctors, the steps, there's a
13 lot of steps. There's a long passageway that I have to walk.
14 Stays busy, packed with people and they just go on, just
15 going, like, they're not -- to me, I feel that they're not
16 looking to see where they're going. They are just going.
17 They are trying to get where they're going.

18 I try my best to stay against the wall so I won't
19 get bumped, because I don't want to be the one to get bumped
20 and laying on the floor and pretty much look like an idiot,
21 you know. So.

22 Q I want to take a look at some of the video in a minute,
23 but while they're cueing it up there.

24 But Mr. Bauta, do you need your cane all the time?

25 A Oh, not necessarily. It depends how I feel. There's

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1868

1 days -- it actually starts when I wake up in the morning.
2 There's days I wake up and I feel no pain. I feel great. But
3 then there's days I wake up and I'm, like, damn, okay, I got
4 to do this and this and this and this. My back is sore. I'm
5 feeling tightness. If I take medication, I'm no good. I
6 can't go nowhere. So that's when I end up taking my cane.

7 But when I don't take the cane, I use my back brace.

8 Q It's been suggested in this trial, Mr. Bauta, you take
9 the cane only when you're going to something that's related to
10 litigation or the case; is that true?

11 A No.

12 Q Can you explain.

13 A I go to my appointments. If I'm going to see my family,
14 I know that I'm going to be a long time, I'll take my cane,
15 just in case. I never know. Anywhere far, that's why I take
16 my cane. If I know there's going to be a lot of steps, a lot
17 of walking, I take my cane.

18 Q Now, you had mentioned some of the trips into the City
19 and the congestion in the subway system.

20 We would like to show what's in evidence as 302.

21 MR. McELFISH: But for counsel, we do have --
22 Mr. Kieffer, do you have the time clock on the exhibit or does
23 it matter?

24 MR. KIEFFER: 22 minutes in for the segment he is
25 about to play.

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1 MR. McELFISH: All screens and lights, please.

2 MR. BARMEN: That's February 2nd, counsel?

3 MR. McELFISH: I believe so.

4 MR. KIEFFER: Yes.

5 MR. McELFISH: It's hard to read on the screen.

6 Are we ready?

7 (Video played.) (Video stops.)

8 MR. McELFISH: Hold on. Let me see if I have...

9 I'm not getting it up on the screen, so let me
10 figure out why. Hold on.

11 (Pause in the proceedings.)

12 MR. McELFISH: Okay. Let me start back.

13 (Video played.)

14 BY MR. McELFISH:

15 Q Is that you there in the video, Mr. Bauta?

16 A Yes.

17 Q And did you know, did you have any idea you were being
18 followed?

19 A No.

20 Q Is that representative of how you need to climb stairs?

21 A Yes.

22 Q Assuming you went to a crowded place outside the City, in
23 Brooklyn near your home, would you still take the cane in the
24 same way?

25 A In Brooklyn, if it's flat surface and it's not far, I'll

Bauta - direct - McElfish

1870

1 -- most likely I'll have my back brace.

2 Q Okay. We'll talk about that in a minute.

3 Now, I want to ask you something specific here when
4 we get to it in a second. These are the passageways you spoke
5 of?

6 A Yes; correct.

7 Q Would you explain to the jury why you're walking next to
8 the wall?

9 A I'm scared to get bumped, and fall. So I have -- I have
10 my cane and the wall for support.

11 Q And you try to do that any time you have that available?

12 A Yes.

13 Q Now, you mentioned the back brace.

14 (Video stopped.)

15 BY MR. McELFISH:

16 Q Can you tell the jury when you use the back brace?

17 A Oh, usually when -- obviously when I'm not using my cane,
18 but around my -- the neighborhood, because I'm not going far.
19 A few times, like when I go see my kids, because they don't --
20 they only live like five minutes from me, walking distance.

21 So that's when I use my back brace. I feel very uncomfortable
22 using my cane with them, around them. So I use my back brace.

23 Q Mr. Bauta, could you just describe what does this back
24 brace look like? Is it a little thing? Is it a big thing?

25 A It's pretty big. I mean, it covers most of my abdomen

Bauta - direct - McElfish

1871

1 area right here and it goes around. And it's from right under
2 the scar of my back, all the way to the middle, and it's about
3 that big on my back. And about like that. Because it comes
4 like that and then the belt. I could adjust it from the
5 front.

6 Q Okay.

7 MR. McELFISH: What I'd like to do now is go to 302
8 and this is from February 2nd also.

9 What is the time stamp, do you know?

10 MR. KIEFFER: The time stamp on that is 1550.

11 MR. McELFISH: 1550 for the record.

12 Publish?

13 (Video played.)

14 BY MR. McELFISH:

15 Q Now, what I want to ask you here, Mr. Bauta, is where
16 were you that day? Do you remember?

17 A I can't really see what it is. It looks like the
18 supermarket.

19 Q Okay. And who were you with at that time?

20 A That was my kids.

21 Q And what were you guys doing?

22 A I was taking them grocery stopping.

23 Q Okay. And is that typically how you would shop after
24 you've had this injury?

25 A Yes.

Bauta - direct - McElfish

1872

1 Q And is that your cart or their cart?

2 A That's their cart.

3 Q Okay. Again, I have to ask. Did you know if anybody was
4 following you in your neighborhood that night?

5 A No.

6 (Video stops.)

7 MR. McELFISH: Okay. Let's go to the back brace.

8 What is it?

9 MR. KIEFFER: 3730. And that is February 18th,
10 2017.

11 MR. McELFISH: This is Saturday, February 18th, time
12 stamp 3730 on Exhibit 302 in evidence.

13 (Video played.)

14 BY MR. McELFISH:

15 Q Now, what are you doing there, Mr. Bauta?

16 A I was waiting for my kids to come down.

17 Q And what are you doing there?

18 A I was giving them Valentine's Day gift.

19 Q And who is the -- which one of your daughters is the one
20 with the red and white hat?

21 A That was actually a bandana.

22 Q Okay.

23 A Puerto Rican flag bandana. That's my oldest daughter,
24 Khadjha.

25 Q Okay. Now here you are, are you wearing the back brace

Bauta - direct - McElfish

1873

1 here?

2 A Yes.

3 Q And you wear it under your shirt?

4 A Yes.

5 Q And at this time did you know you were being followed?

6 A No.

7 Q And that's Khadjha there?

8 A Yes, it is.

9 Q And where were you guys going?

10 A We, if I remember correctly, we was going to my sister's
11 house.

12 Q Okay. And if we look at the time stamp, this is
13 February 2017, about a year and three-quarters after the
14 surgery; right?

15 A Yeah.

16 Q And is that basically representative of how you are now?

17 A Pretty much, yeah.

18 Q So that's a view for the jury as to how you are with the
19 back brace and a view as to how you are with the cane.

20 A Yes.

21 (Video stops.)

22 Q Has Dr. Cordiale talked to you about whether or not he
23 thinks you're going to need future surgery?

24 MR. BARMEN: Objection.

25 THE COURT: Sustained.

Bauta - direct - McElfish

1874

1 MR. McELFISH: We can take the lights up, Judge.

2 Q Now, at some point you went to see Dr. Thomas -- Lawrence
3 Thomas, James Lawrence Thomas.

4 A Yes.

5 Q And do you have some recollection of when you went to see
6 Dr. Thomas?

7 A About a year or so ago. I'm not exactly sure.

8 Q And who referred you to Dr. Thomas?

9 A Dr. Honor.

10 Q And was that after Dr. Honor had met and examined you?

11 A Yes, correct.

12 Q And what complaints did you make to Dr. Thomas when you
13 first went to see him?

14 A I mentioned about having pain in my head; dizzy. The
15 pains in my back. My leg I mentioned. That being
16 uncomfortable with my back, the pain. The muscle spasms. My
17 train of thoughts and remembering things. And reading.

18 Q And for how long have you been seeing Dr. Thomas?

19 A About over a year now.

20 Q And what kind of things --

21 MR. McELFISH: Withdrawn.

22 Q What kind of things is he doing for you?

23 A It's quite a few. He's given me a few different
24 treatments. Before he starts any treatments, he shows me what
25 it is. He goes into details of exactly how it could help and

Bauta - direct - McElfish

1875

1 how does it work and stuff like that. And if I -- and he
2 gives me the option whether I want to try it or not, and if I
3 choose to try it and I don't feel any -- feel any change or
4 anything like that, I let him know and we move on to a next
5 one.

6 Q And do you feel that Dr. Thomas has helped you in the
7 complaints that you had and the issues you were having from
8 the accident?

9 A Yes. Definitely.

10 Q Can you explain how.

11 A When I first started seeing him, my pain -- when he asked
12 me my pain from 1 to 10, 10 being the worst, I made it clear
13 to him that my pain is nowhere near ten. It's way beyond. To
14 this day now, my pain has dropped a lot. From maybe four,
15 sometimes even a two. And I feel and see myself being
16 different since I started seeing Dr. Thomas.

17 Q What do you mean?

18 A My train of thought and just trying to remember things
19 has gotten better. It's not how it used to be, but it is
20 better than it was. The pain in my back. He's given me
21 exercises to help relax and ease the pain. I mean, it doesn't
22 completely go away, but it helps ease it; makes it more
23 manageable. And I -- I don't -- I don't even know. Like,
24 there's a big difference since I started until now. It's
25 completely different.

Bauta - direct - McElfish

1876

1 Q Have you ever had back pain in your life?

2 A Just once when I was diagnosed with pneumonia.

3 Q Do you know the year of that?

4 A It's about, I think like 2009? Not really sure.

5 Q Was that your upper back or your lower back?

6 A It was my upper back.

7 Q Have you ever had pain at all in your lower back your
8 whole life?

9 A No, never.

10 Q Have you ever had pain in your neck your whole life?

11 A No, never.

12 Q Have you ever had pain in your leg, either your right or
13 your left, your whole life?

14 A No, never.

15 Q Have you ever gone to a doctor in your whole life for
16 your head, your neck, your back, other than the flu?

17 A No, never.

18 Except once, actually.

19 Q Yes?

20 A When I had left from work and from the steam where I work
21 at, like inhaling that, just gave me a headache. So I went to
22 the hospital for it.

23 Q What year was that?

24 A Not really sure. I was working at McDonald's.

25 Q 2005? Does that refresh your recollection?

Bauta - direct - McElfish

1877

1 A About that. About that, yeah.

2 Q Are you currently doing any type of physical therapy or
3 chiropractics?

4 A Yes.

5 Q And what are you doing?

6 A Seeing Dr. Thomas.

7 Q I meant not -- I'm sorry. Not the head stuff, but for
8 the back and the leg?

9 A No. I kind of like stopped doing that, because not that
10 it wasn't working, because it was working, but when I leave
11 from there, I'm in no pain. But then when I get on the train
12 and I have to do all the walking, the climbing the steps and
13 everything, by the time I get home, I'm in pain again. So it
14 was, in a way, it was like, why.

15 Q Going back to Dr. Thomas.

16 Did you ever complain to him of the light bothering
17 you, and anxiety?

18 A Yes.

19 Q Tell the jury about that, please.

20 A There were days where I start having a headache and it's
21 in the same side where I got hit, on my right side. And it
22 gets so -- the pain is like unbearable to a point where I
23 can't stand the light, can't stand the sound and I pretty much
24 just lock myself in a room and just close -- turn off all the
25 lights and try to ease myself.

Bauta - direct - McElfish

1878

1 Q And what kind of things make you anxious after the
2 accident?

3 A The fact that I can't keep up with my kids. They want to
4 go places and they want to, like, we used to speed walk a lot.
5 I can't do that no more. They want to go hang out, go far, I
6 can't really do that, because I'll have to stop and tell them
7 like, look, my back hurts, you know, or like I'm getting
8 light-headed or something like that.

9 Or like there will be days where we make plans,
10 like, probably go to the movies and I'll get up, shower, get
11 dressed, but by the time I finish getting dressed, I sit down
12 because I'm completely out of breath. My back starts to hurt
13 and I have to let them know, like, we have to reschedule.
14 We'll go probably tomorrow when I feel better or next week.

15

16 (Continued on following page.)

17

18

19

20

21

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24

25

Baute - direct - McElfish

1879

1 BY MR. McELFISH: (Continuing)

2 Q Now, do you have anxiety around large vehicles?

3 A Yes, I do.

4 Q Could you explain?

5 A Like, one day, I was walking and a big truck just zoomed
6 past and, like, I just felt like my heart just dropped and,
7 like, I just turned back and I went back home. I couldn't
8 even go where I was going.

9 Q We understood from Dr. Goldman's testimony that you took
10 a bus trip within a couple of weeks of this accident. Can you
11 tell the jury about that?

12 A Yes, I did. I was -- my girlfriend at the time, or
13 significant other, I haven't seen her for a while and I was
14 lonely. I missed her. So I, I knew it wasn't the smartest
15 thing to do but I did it anyway because I wanted to see her.

16 Q And how was that ride for you?

17 A I wish I didn't do it because I got there and I was,
18 like, my heart was just beating and happy I made it to see her
19 but, yeah, it wasn't a good ride. It wasn't, like, how it
20 used to be, like, oh, yes, I'm, you know, I'm going to see
21 her, and, you know, but now it's -- like, at that time, it
22 was, I got there and I'm -- all I'm thinking about is, okay, I
23 hope nothing happens, I hope nothing happens.

24 Q Did you take another trip overnight like the accident or
25 was this a different trip?

Bauta - direct - McElfish

1880

1 A I came back the very next day.

2 Q I'm sorry if I wasn't clear.

3 The accident -- the trip, the second trip, was that
4 a daytime trip or a nighttime trip?

5 A It was nighttime.

6 Q Did you ever do it again?

7 A No.

8 Q Were you in pain during the trip?

9 A Yes.

10 MR. McELFISH: Judge, I'm at a breaking point.

11 THE COURT: Okay. Let's take our lunch break,
12 ladies and gentlemen. I'll see you back here at 1:30. Okay.
13 Same admonitions.

14 (Jury exits.)

15 THE COURT: Okay. Mr. Bauta, you are not to confer
16 with Mr. McElfish or any of the other lawyers because you are
17 still giving testimony. Okay?

18 THE WITNESS: Okay. Can they pay for my lunch
19 though?

20 THE COURT: That's up to him.

21 (Luncheon recess.)

22

23

24

25

Bauta - direct - McElfish

1881

1 **AFTERNOON SESSION**

2 (In open court.)

3 (JUDGE RAMON E. REYES enters the courtroom.)

4 (The following occurs outside the presence of the jury.)

5 THE COURT: We are on the record.

6 MR. SAAL: We would like to put on the record to
7 confirm that we're going to be reserving arguments on
8 judgments as a matter of law at the close of plaintiff's case
9 for tomorrow morning when Mr. Ortiz is back in court. I want
10 to confirm that for the record.

11 THE COURT: Yes, and I was going to make a statement
12 to that effect at the end of plaintiff's case.

13 MR. SAAL: Thank you, Your Honor. I appreciate it.

14 THE COURT: Would you give me an approximation,
15 Mr. McElfish, on how much longer you have?

16 MR. McELFISH: 20 minutes. 15, maybe.

17 THE COURT: Great. Thank you.

18 (The witness resumes the stand.)

19 (Jury enters.)

20 THE COURT: You may be seated.

21 You may continue, Mr. McElfish.

22 MR. McELFISH: Thank you.

23 DIRECT EXAMINATION

24 BY MR. McELFISH: (Continuing.)

25 Q Mr. Bauta prior to the accident had you endeavored to

Bauta - direct - McElfish

1882

1 finish your high school diploma or get a GED?

2 A I was already starting. I had started before the
3 accident. And was going through it and then that's when the
4 accident happened and I was more than halfway through it.

5 Q I was going to ask you that. If you're more than
6 halfway, do you recall what percentage you had of completing
7 the GED or the high school diploma prior to the accident?

8 A I would say about 75 to 80 percent around there. Maybe
9 more.

10 Q Were you willing to accept a GED or did you want a high
11 school diploma?

12 A I wanted a high school diploma.

13 Q Please explain.

14 A What I was taking was for high school diploma. It was a
15 program in New Jersey that I found and they will send me work
16 and stuff like that and I will do it at home and once I'm done
17 I will turn it in and send it back and then they will send me
18 more work.

19 Q And did you receive your high school diploma?

20 A Yes, I did.

21 Q And when did you do that?

22 A It was the following January.

23 Q After the accident?

24 A Yes.

25 Q And did you receive any assistance in receiving it?

Bauta - direct - McElfish

1883

1 A Yes, I did.

2 Q How -- Why did you need help?

3 A I had troubles. Reading, I wasn't able to read as much
4 as before. The thinking process and the thoughts, I was
5 having a lot of trouble with it so I asked my sister to help
6 me.

7 Q And how about, Martin did he help you?

8 A Yes. Any chance he got. I asked him and he helped me.

9 Q Do you feel good about getting that?

10 A Definitely.

11 Q Okay. I want to go to -- during the litigation you
12 underwent a lot of testing with various doctors and expert
13 witnesses. Do you recall that?

14 A Yes.

15 Q And in particular you took some neuropsychological tests
16 with Dr. Honor and Dr. Thomas and the defense expert in this
17 case, Dr. Morgan. Do you recall that?

18 A Yes.

19 Q Were you permitted a break during the exam of Dr. Morgan?

20 A Yes, I was.

21 Q Were you given the option of splitting the testing up
22 into multiple days?

23 A I don't recall that.

24 Q And during the testing with Dr. Morgan, did you have to
25 take medication?

Bauta - direct - McElfish

1884

1 A Yes, I did.

2 Q What kind did you take?

3 A It was a muscle relaxer.

4 Q And how did that affect you?

5 A It made me drowsy and it was making me fall asleep.

6 Q And why did you need medication during the testing?

7 A I was feeling uncomfortable. I was feeling muscle spasms
8 and I couldn't deal with it.

9 Q And how long did you have to sit for the testing with
10 Dr. Morgan?

11 A It was all day about probably eight maybe, eight hours
12 maybe.

13 Q Now, prior to the accident could you give the jury -- and
14 by the way, this is going to be some of my last questioning.
15 Mr. Barmen is going to have some questioning when I'm done.

16 Can you go through some of the activities that you
17 routinely did before the accident, physical activities?

18 A Well, I did my laundry. I did my grocery shopping with
19 no problem. I used to run. I used to go to the park and run
20 around the tracks and work out. I did a lot of lifting, just
21 anything to keep me moving. Like, long walks, like I
22 mentioned before, that was something I loved and enjoyed. It
23 was pretty much anything that could keep me moving, just make
24 my blood go and make my heart pump and now it's completely
25 different.

Bauta - direct - McElfish

1885

1 Q Did you play any sports prior to the accident?

2 A Yes, I did.

3 Q Could you give the jury an idea of what?

4 A I played football, baseball, handball and I can't do that
5 now.

6 Q How about bowling or pool?

7 A Yes.

8 Q When you say you worked out prior to the accident, could
9 you give the jury an idea of what you were doing?

10 A I did weightlifting, squats. I ran a lot, jump rope,
11 dead lifts, pretty much quite a bit of different workouts I
12 did.

13 Q Can you do any of those activities now?

14 A No, I cannot.

15 Q And with respect to walking, how far can you walk now?

16 A Probably about 30 or 45 minutes, an hour tops maybe.

17 Q And what happens after that?

18 A An hour is just pushing it. I could start with no pain
19 and by the time I finish and I sit still or stand still, I'm
20 in pain.

21 Q And with respect to any sort of physical limitation or
22 restriction, did you have any restrictions on bending before
23 the accident, bending over, bending down?

24 A No, I had no issues with that.

25 Q Did you ever have any problems before the accident for

Bauta - direct - McElfish

1886

1 how long you could is it?

2 A No, never.

3 Q Did you ever have any problems with how long you could
4 stand?

5 A No, never.

6 Q Did you have any problems with how much weight you could
7 lift or carry prior to the accident?

8 A No, never.

9 Q And do you have limitations with respect to those areas
10 now?

11 A Yes, I do.

12 Q Can you explain?

13 A After my surgery and the accident and everything, I tried
14 for a moment and I realized I couldn't do it without pain. I
15 tried to lift my groceries and I had to stop every two or
16 three steps and put it down. It takes me about an hour just
17 to get home from the grocery store if I didn't have a cart.
18 And just, like, walking up the steps with my cart or anything
19 like that, I could barely do it now. I always have to ring my
20 dad's bell and have him come out and help me so that way I
21 will be able to lift it.

22 Q And how have -- are you able to bend over now?

23 A Not like before.

24 Q And how long can you sit now without a problem?

25 A Without trying to push it, I can sit maybe 30 or 35

Bauta - direct - McElfish

1887

1 minutes before I start feeling anything.

2 Q And did you feel it this morning as you're sitting on the
3 witness stand?

4 A Yes. And I'm feeling it now.

5 Q And in terms of your daily activity, your daily activity
6 in terms of getting ready and showered and dressed, has that
7 changed since the accident?

8 A Yes.

9 Q Can you explain, please?

10 A Now it's like -- it takes me close to three hours. I
11 have to get up, like, four hours earlier just so I don't have
12 to rush and I could take my time so I won't have to end up
13 hurting myself. I would shower. I would sit down after I
14 shower. By the time I finish getting dressed and everything,
15 I'm in slight pain.

16 Q Other than it taking you a lot longer, is it painful?

17 A Yes.

18 Q And how about other daily routines in life, such as going
19 up and down stairs at the subway or just being able to
20 generally move around, has that changed?

21 A It's a task at hand. I mean, I got to get to where I got
22 to get to and a lot of times I will reach my destination but
23 it's not without pain. I will get there and have to take deep
24 breaths, sit down and relax before I'm able to do whatever I
25 have to do at that destination.

Bauta - direct - McElfish

1888

1 Q And you mentioned reading and your memory. Can you tell
2 the jury, please, the difference between your memory before
3 the accident and now?

4 A It's times where before I didn't -- it was hard for me to
5 forget anything. You know, and I was always out the door have
6 no problem and now it's like, okay, I get out the door, I
7 reach two blocks away and I'm like, okay, I forgot my phone or
8 my keys or probably forgot to lock the door or something.

9 Q And what about the change in your ability to read?

10 A That was another thing I used to like doing. I enjoyed
11 it, reading. I used to read a book in one day. Now, 15
12 minutes tops, maybe. I got to close the book because my head
13 is hurting.

14 Q Are there days, Mr. Bauta, when you wake up in pain and
15 days you don't?

16 A Yes.

17 Q Could you explain that?

18 A There's days I wake up and I feel great, but then taking
19 a shower or the movements getting ready and everything I'm in
20 pain. There's a time where I actually wake up sore and I've
21 got to take medication and that's where I can't even make it
22 to my appointments.

23 Q What did Dr. Cordiale tell you about using the cane?

24 A Use it as needed.

25 Q And do you have -- how old are you?

Bauta - direct - McElfish

1889

1 A I'm 42.

2 Q At 42 years old do you have any embarrassment in needing
3 to use that cane?

4 A Yes.

5 Q And can you please explain that to the jury?

6 A I hate bringing it around my kids. I don't feel
7 comfortable when I'm walking somewhere and people are looking
8 at me like what the heck is wrong with him, you know; he looks
9 so young, whatever, whatever. And sometimes I feel like my
10 kids are, like, seeing me different from when I used to run
11 around to where I can't even walk like half a mile without a
12 complaint of my back.

13 Q And other than your kids, such as strangers, do you feel
14 embarrassed when people see you?

15 A Most of the time, yes.

16 Q Do you still need medication?

17 A I take it as needed.

18 Q And what do you take?

19 A I don't know the name of it offhand. It's like a generic
20 bottle. It's a muscle relaxer.

21 Q How does it affect you?

22 A It makes me drowsy and sleepy.

23 Q And has this accident had any affect on your ability to
24 sleep, get a good night's rest?

25 A Yes.

Bauta - direct - McElfish

1890

1 Q Please explain.

2 A I could lay down. I lay on my back. It hurts, it hurts.
3 I lay on my side, it hurts. I lay on my stomach, it hurts.
4 And then I could lay down about 9:30 10:00 maybe by 3, 3:30,
5 4:00 in the morning, I'm finally asleep because the whole time
6 I'm tossing and turning.

7 Q And does that have an effect on your ability to be
8 productive the next day?

9 A Definitely.

10 Q How so?

11 A I wake up tired, exhausted, over sleep. I've got to be
12 somewhere sometimes like 10:00 I'm waking up at 1:00.

13 Q As a result of what's happened, Mr. Bauta, do you have
14 fear about the future?

15 A Definitely.

16 Q And can you explain for the jury, please?

17 A I think about how if things doesn't get any better,
18 obviously it will get worse. If I have to have another
19 surgery, that's another recovery time I have to deal with;
20 more pain, more time away from my kids. It's just nerve
21 wracking and exhausting just thinking of it.

22 Q Do you worry about how your health is going to be many
23 years from now?

24 A Yes, I do.

25 Q Do you worry about how you're going to financially

Bauta - direct - McElfish

1891

1 support your children?

2 A Yes, I do.

3 Q Will you explain that to the jury, please.

4 A My kids are getting older. One is about to graduate next
5 year from high school. I want to be able to be there when she
6 graduates and of course now here comes the boyfriends and
7 stuff like that. I want to be able to protect her from that.
8 I don't want anything to happen to them. I want to be able
9 to, you know, be present when they need me, not worrying
10 about, wow, I'm in pain. I can't make it right now. There's
11 no excuse when it comes to my kids, to no kid, period.

12 Q And presently, do you help your dad?

13 A Yes, I do.

14 Q And, first of all, why do you help your dad?

15 A He's of age, 76. He's diabetic. He has cataracts,
16 glaucoma, a bad heart. He's been through a lot in his life.
17 His vision is very blurry, he can't see that good so I try to
18 help him and make sure he takes his medication, make sure he
19 takes the right medication, adjust his insulin, accompany him
20 to his -- to his appointments, whenever he has appointments.
21 I schedule his appointments.

22 There's a lot, but, I mean, I'm not just going to
23 turn my back on my dad just because I'm not feeling good or
24 I'm not doing well, because he won't do it for me.

25 Q Mr. Bauta, thank you. That's all the questions that I

Bauta - cross - Barman

1892

1 have. Mr. Barman is going to have some questions for you in
2 cross-examination.

3 MR. McELFISH: Your witness.

4 CROSS-EXAMINATION

5 BY MR. BARMEN:

6 Q Mr. Bauta, sir, how are you?

7 A I'm okay. I could be better, but I'm here. How are you?

8 Q We're all here. It's nice to see you again, sir.

9 You've had a lot of medical treatment throughout the
10 course of care since the accident and we're going to talk
11 about some of it, but I want to start by asking, certainly you
12 were honest and forthright with all of your medical providers?

13 A Yes.

14 Q You told them the truth because the idea of going to see
15 them was you wanted to get better.

16 A Correct.

17 Q Okay. I'm going to jump around a little bit, so bear
18 with me but I'm going to try to get through this as quickly as
19 I can.

20 A All right.

21 Q You were just talking about your fear of the future and
22 one of the things you said was you fear having to have another
23 surgery; correct?

24 A Yes, correct.

25 Q Has any doctor that treats you ever told you that you're

Bauta - cross - Barmen

1893

1 going to need another surgery?

2 A Not in full detail, but they said it could happen.

3 Q Okay. It could happen down the road, but nobody told
4 you, Hey, Mr. Bauta, you're going to need to have another
5 surgery in five or ten years; correct?

6 A It was mentioned.

7 Q By who?

8 A That in the future I could probably have another surgery
9 if things don't get better.

10 Q You haven't been in court. Has anybody told you about
11 the testimony of your treating surgeon, Dr. Cordiale?

12 A No.

13 Q Certainly Dr. Cordiale hasn't told you that you need
14 surgery on your neck; correct?

15 A No, not to my knowledge, no. It was more my back.

16 Q Well, Dr. Cordiale told this jury that he can't say that
17 you need additional surgery on your back. Are you aware of
18 that?

19 MR. McELFISH: Objection.

20 THE COURT: Overruled.

21 Q You can answer.

22 A Can you repeat that, please?

23 Q Were you aware, are you aware, that Dr. Cordiale came in
24 here and testified and told the jury that he can't say with
25 any certainly whether or not you will ever need another

Bauta - cross - Barmen

1894

1 surgery on your back.

2 A Well, I wasn't aware of anything that was going on in
3 court, but from what me and him spoke about, he mentioned that
4 maybe -- which will probably be the same as what you're saying
5 right now.

6 Q As of right now, you are only prescribed one medication
7 and it's a muscle relaxer; right?

8 A Correct.

9 Q And you only take it as needed?

10 A Yes.

11 Q Did I hear you right that you said you have stopped doing
12 physical therapy?

13 A For the fact of when I do that, I do my physical therapy,
14 I feel good, but when I get on the train by the time I reach
15 home, I'm in pain again.

16 Q Sir you've stopped doing physical therapy; correct?

17 A Yes.

18 Q And how long has it been since you did physical therapy
19 regularly? And by "regularly" -- excuse me, by "regularly" I
20 mean two or three times a week.

21 A It's about a few months now.

22 Q Has anybody other than Dr. Cordiale ever prescribed
23 physical therapy for you since your surgery?

24 A Since the surgery? It was Cordiale.

25 Q So no one else has; correct?

Bauta - cross - Barmen

1895

1 A I was already going to physical therapy.

2 Q Sir, has any doctor other than Cordiale since your
3 surgery prescribed you physical therapy, yes or no?

4 A No.

5 Q Okay. You said you're still having trouble sleeping?

6 A Yes, I do.

7 Q Isn't that one of the things that Dr. Thomas is helping
8 you with?

9 A Yes.

10 Q And hasn't your sleep gotten better since you started
11 treating with Dr. Thomas?

12 A Yes.

13 Q In fact, didn't you tell Dr. Thomas at one point that you
14 had been sleeping like a baby?

15 A Sometimes, yeah.

16 Q You talked about your love of reading and you used to
17 read hours at a time?

18 A Repeat that.

19 Q You talked about your love of reading?

20 A Yes.

21 Q And you used to read hours at a time?

22 A Yes.

23 Q And you can still read just not as long as you used to,
24 fair?

25 A Yes, correct.

Bauta - cross - Barmen

1896

1 Q And certainly you are able to comprehend and understand
2 what you read?

3 A Not like before, but yes.

4 Q If someone came in here and said you had a first grade
5 reading level, you would certainly disagree with that, fair?

6 A Would I, yeah.

7 Q Okay. So if your treating neuropsychologist said that,
8 you would disagree with him; fair?

9 A Well, since my accident, my reading has been bad.

10 Q Sir, you're capable of reading something and
11 understanding what it means, fair?

12 A Somewhat, yes.

13 Q Okay. You are exercising again, aren't you?

14 A Exercising?

15 Q Yes.

16 A No.

17 Q You're not working out these days?

18 A No, not working down.

19 Q You're not doing squats, lunges and wall pushups twice a
20 week?

21 A That would be therapy which I was doing at home from
22 after my surgery that I was doing at the hospital, that I
23 continued doing at home.

24 Q Okay. So at home you do squats, true?

25 A Yes, yes.

Bauta - cross - Barmen

1897

1 Q At home you do lunges, true?

2 A Yes.

3 Q At home you do wall pushups?

4 A Yes.

5 Q So you're exercising, fair?

6 A All right.

7 Q Fair?

8 A All right, yeah.

9 Q And we know you're doing some walking?

10 A Yes.

11 Q Sometimes with your cane and sometimes without?

12 A Yes.

13 Q The jury has seen video of you walking with your cane and
14 without about a year ago.

15 A Yes.

16 Q You've seen those videos?

17 A Yes.

18 Q And I think you testified on direct examination that
19 you're doing as well or better than you were a year ago?

20 A Yes.

21 Q You certainly haven't gotten worse since February of
22 2017; is that fair?

23 A No, just slight better, yes.

24 Q Better, okay.

25 A Yes.

Bauta - cross - Barmen

1898

1 Q Now, on the videos we saw, you were walking without your
2 cane. You saw those videos; correct?

3 A Yes.

4 Q And you didn't appear to have a limp in those videos;
5 correct?

6 A A slight limp, yes.

7 Q Those are what would you would call your good days?

8 A Yes, I was wearing my back brace at the time also.

9 Q We've taken your deposition three times and you never
10 talked about walking without your cane and a back brace. Is
11 there a reason for that?

12 MR. McELFISH: Objection, improper impeachment.

13 THE COURT: Sustained.

14 Q One have been of the things you talked about, sir,
15 towards the end of your direct testimony was your inability to
16 support your kids. That causes you stress, fair?

17 A Yes, financial stress, yes.

18 Q Okay. You had the same financial stresses before the
19 accident, did you not?

20 A Not really, no.

21 Q You were out of work for a year before the accident
22 weren't you?

23 A Yes.

24 Q And at times your sister Maria had to help you out?

25 A Yes.

Bauta - cross - Barmen

1899

1 Q Did you have stresses about your abilities to financially
2 care for yourself and your kids then?

3 A Not necessarily because I was still earning an income.

4 Q Doing some odd jobs here or there, raking leaves, et
5 cetera?

6 A Right, and I was getting unemployment.

7 Q Okay. Isn't it true that you were on public assistance
8 prior to the accident?

9 A Right after the accident.

10 Q Not before?

11 A No.

12 Q Isn't it also true that the reason you started getting
13 your GED before the accident was because the state service
14 that provided the assistance required you to either be working
15 or going to school?

16 A Well, it was a choice. You could either go to work or go
17 to school. I chose to go to school.

18 Q And that was when you were applying for public assistance
19 before the accident, true?

20 A That was, like, 20 years ago.

21 Q So you started your GED 20 years ago as part of going on
22 public assistance before the accident, true?

23 A What you're referring to is about 20 years ago. That's
24 what you're referring to.

25 Q You went on public assistance before the accident; I

Bauta - cross - Barmen

1900

1 don't care if it's five years ago or 20 years ago; you did,
2 didn't you?

3 MR. McELFISH: Asked and answered.

4 THE COURT: Overruled.

5 A There was a time that I did go on public assistance
6 before the accident.

7 Q That's when you started your GED program because you were
8 required to either get a job or be in school, fair?

9 A I'm going to say yes.

10 Q And 20 years ago wasn't the only time that you were
11 getting some sort of public assistance before the accident;
12 isn't that also true?

13 A Yes.

14 Q So I'm going to ask the question again. You had some
15 stresses and concerns about supporting your family before the
16 accident, yes or no?

17 A No.

18 Q How were you supporting your kids when you were in
19 Ogdenberg for twelve years?

20 A I was paying child support.

21 Q Were you always current on your child support?

22 A For a time, yes.

23 Q There was a time before your accident that you weren't
24 current on your child support, true?

25 A There was, yes.

Bauta - cross - Barmen

1901

1 Q But, again, you weren't having financial stresses before
2 the accident?

3 A No. Because I had an income.

4 Q And that's when you were working at McDonald's?

5 A Yes.

6 Q And I believe, sir, you said you were working full-time
7 and you worked your way up to a management position?

8 A Yes.

9 MR. BARMEN: On the small screens only, P 304-001.
10 And, actually, can we look at 002 on small screens too,
11 please.

12 Your Honor, may I publish?

13 MR. McELFISH: Foundation, hearsay.

14 THE COURT: Hold on just one second. What exhibit
15 number is this?

16 MR. BARMEN: Plaintiff's 304-001 and 002. 002 is
17 the supporting affidavit.

18 THE COURT: This is plaintiff's?

19 MR. BARMEN: Yes, Your Honor, produced by
20 Mr. McElfish.

21 THE COURT: I will receive it in evidence.

22 MR. McELFISH: I'm sorry?

23 THE COURT: I will receive it in evidence.

24 (Plaintiff's Exhibit 304-001 and 304-002 received in
25 evidence.)

Bauta - cross - Barmen

1902

1 MR. BARMEN: Can you publish 001, please.

2 (Exhibit published.)

3 Q Mr. Bauta, you will see it on your screen there and if
4 it's black just tap it. Do you see it?

5 A Yes. I have no clue what I'm looking at.

6 Q Okay. You've never seen this before?

7 A Maybe I did, but I don't remember. I don't recall.

8 MR. BARMEN: Can you put up 002, please, and then
9 we'll come back to 001.

10 (Exhibit published.)

11 Q This is an affidavit from a Diane Brown, Global Labor and
12 Employment Law on behalf of McDonald's Corporation indicating
13 that the letter she provided was true and accurate. You've
14 never seen this before?

15 A No.

16 MR. BARMEN: Okay. Can you go back to 001, please.

17 (Exhibit published.)

18 Q Sir, according to McDonald's you were employed for a
19 short time as a part-time crew person working fluctuating
20 hours. Are you still maintaining you were full-time
21 management personnel at McDonald's when you worked in
22 Ogdenberg?

23 A Yes.

24 Q So McDonald's Corporation has it wrong?

25 A Something has to be wrong because I know for a fact that

Bauta - cross - Barmen

1903

1 I was full-time.

2 Q Okay. Sir, you didn't get laid off from McDonald's. You
3 lost your job when they found out about a conviction of yours,
4 true?

5 A I was laid off.

6 Q Because of your conviction?

7 A Yes. I was laid off because of my conviction, yes.

8 Q And when you came out of jail and went back to work,
9 eventually you had to fill out another application, did you
10 not?

11 A Yes.

12 Q And you did not disclose on that application that you had
13 a felony, true?

14 A I filled it out and the person that rehired me already
15 knew about what I went through.

16 Q Did you mark on that application that you had a felony?

17 A Yes, I did.

18 Q Since your employment at McDonald's, I think you filled
19 out one job application between 2012 and now?

20 A No, I filled out more.

21 Q Well, you were able to tell us you filled out one with a
22 grocery store Sav-a-Lot but you were not able to name any
23 other place you ever applied for work.

24 A I did so name a few other places.

25 Q Like what?

Bauta - cross - Barmen

1904

1 A I named Walgreen's, I named Pizza Hut. I named Sunoco.

2 Q Did you actually fill out applications?

3 A Yes, I did.

4 MR. BARMEN: Can you pull up GLI 042582, Exhibit
5 441.

6 THE COURT: Defendant's or Plaintiff's?

7 MR. BARMEN: Defendant's.

8 Q Sir, is this the application you filled out for Sav-a-Lot
9 in September of 2010?

10 A Yes.

11 MR. BARMEN: Permission to publish, Your Honor?

12 MR. McELFISH: Foundation, hearsay.

13 THE COURT: This is Defendant's 425?

14 MR. BARMEN: 441, Your Honor.

15 THE COURT: And that's the only page of 441?

16 MR. BARMEN: The total document is four pages, Your
17 Honor.

18 THE COURT: Do you want to --

19 MR. BARMEN: The defendants would move to admit all
20 four pages of this exhibit.

21 MR. McELFISH: Can you put the other pages up?

22 MR. BARMEN: Sure. Can you scroll through them,
23 please.

24 MR. McELFISH: Same objection. May we approach on
25 this?

Bauta - cross - Barmen

1905

1 THE COURT: Yes, you may.

2 (Sidebar held outside of the hearing of the jury.)

3 (Continued on next page.)

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Sidebar

1906

1 (The following sidebar took place outside the
2 hearing of the jury.)

3 THE COURT: This is dated 2010.

4 MR. BARMEN: Right. The issue is he signed a
5 document indicating that it's true and accurate and he denied
6 having a felony and that's the only job application they've
7 given us.

8 MR. MANNION: And he admitted it was his.

9 MR. BARMEN: That's the only one I have.

10 MR. McELFISH: Nor was it exchanged in discovery.
11 It was not turned over. Sorry, guys.

12 THE COURT: Was it turned over in discovery?

13 MR. BARMEN: Yes, it was.

14 MR. McELFISH: I've never seen that document in my
15 life and I've seen everything.

16 MR. MANNION: That's not accurate.

17 MR. McELFISH: If you can show me that it's
18 disclosed --

19 THE COURT: Just because you haven't seen it, does
20 not mean it was not disclosed. Your grasp of the evidence is
21 not complete. Maybe Ms. Diamond or someone else has seen it,
22 but what is the point of this, that it's pure impeachment,
23 that he lied on a job application?

24 MR. BARMEN: It's the only one I'm using because
25 it's the only one I have. He said he applied to multiple

Sidebar

1907

1 jobs.

2 THE COURT: Since the accident. This is
3 preaccident.

4 MR. BARMEN: He's saying he didn't have any
5 financial issues before the accident. He couldn't find work
6 before the accident, Your Honor. He was on public assistance.
7 It's contrary to what he testified to on direct.

8 THE COURT: You're dirtying him up. I get it. He
9 lied on a job application. You have testimony about his
10 ability preaccident to provide for his family. I mean, you've
11 sufficiently undercut his credibility on that.

12 MR. BARMEN: He also testified that he didn't fail
13 to disclose his felony on other job applications and here we
14 have him doing just that.

15 MR. MANNION: He just said that.

16 MR. BARMEN: It's three questions on this and I move
17 on.

18 MR. McELFISH: It's improper.

19 MR. MANNION: I don't believe it's improper at all.
20 He admitted it's his. He just said he did not respond "no"
21 when asked about --

22 MR. BARMEN: He certifies it's true and accurate.

23 THE COURT: Lay a better foundation for it.

24 MR. McELFISH: Also while we're here, he has moved
25 in two pages of the McDonald's file that was subpoenaed.

Sidebar

1908

1 There's 20 pages. I'm going to move to rest. I don't want to
2 waste sidebars but when we're here are there any issues with
3 it?

4 THE COURT: Plaintiff 302?

5 MR. McELFISH: I think it's 304. It shows the years
6 he worked and things of that nature.

7 MR. BARMEN: We have no objection to that.

8 THE COURT: 304 is admitted in its entirety.

9 (Plaintiff's Exhibit 304 received in evidence.)

10 MR. McELFISH: Subject to redactions of --

11 THE COURT: Social Security numbers and such.

12 MR. McELFISH: One more thing on this when you're
13 done.

14 THE COURT: Go ahead.

15 MR. McELFISH: Back to my argument this morning
16 the -- this is an improper impeachment with this document for
17 the reasons you've allowed the convictions into evidence.
18 This does not demonstrate emotional distress. This is simply
19 impeachment under 609 and it's not the reason you allowed them
20 to have it. For instance, if he said I was stressed out
21 because I had my felony, it caused me a lot of problems, it
22 would go to it. It's a straight dirty up.

23 THE COURT: It's pure impeachment. He lied on a job
24 application.

25 MR. BARMEN: They failed to object to this document

Sidebar

1909

1 in the pretrial order.

2 MR. McELFISH: It was not turned over in discovery,
3 guys, and you know it.

4 THE COURT: Wait a second. Do you want to stick
5 with that at the risk of being sanctioned?

6 MR. McELFISH: I don't know.

7 THE COURT: Okay. So, do you have proof that it was
8 turned over? Did you get this?

9 MR. BARMEN: This was provided years.

10 MR. McELFISH: I have no idea what this is. This
11 looks like it's from McDonald's because they went to the
12 Lettuce Feed You --

13 MR. BARMEN: The Lettuce Feed You is part of the
14 McDonald's stuff.

15 THE COURT: Do you have letters produced here with
16 pages GLI-1 to whatever?

17 MR. SAAL: We did provide the flash drive with the
18 exhibits before trial. You're talking about when it was
19 turned over years ago, I'd have to look at that.

20 MR. MANNION: This was provided prior to the
21 Pre-Trial Order.

22 MR. BARMEN: We can find the transmittal letter. It
23 was a while ago.

24 MR. SAAL: You're probably talking 2015.

25 THE COURT: 2016. All of you need to do a better

Sidebar

1910

1 job next time you appear in the Eastern District of New York.
2 Have your ship locked tight. Every judge in this court is
3 going to know about this stuff, every single one. It's
4 ridiculous. If it was produced in discovery, you've got a
5 problem.

6 MR. McELFISH: I said I don't know for sure.

7 THE COURT: Then do not make a statement like that.

8 MR. McELFISH: You asked me if I would stick to it
9 and I said no. I didn't know for sure.

10 THE COURT: Then do not go spouting off at the
11 mouth. Do no write a check that your behind cannot cash. You
12 are doing it constantly every single time.

13 MR. McELFISH: Can I ask you a favor, please.

14 THE COURT: This is out.

15 MR. McELFISH: Please.

16 MR. BARMEN: Out?

17 THE COURT: It's out. Just move on to something
18 else. Stop it.

19 MR. McELFISH: Can I ask a favor? I'm just asking
20 you not to insult me on the record you. Can insult me off the
21 record all day. I'm trying to be fair.

22 THE COURT: No, you're not. You cannot help
23 yourself. This is the way you do business. That is fine.

24 MR. McELFISH: It's not.

25 THE COURT: Then stop it.

Sidebar

1911

1 MR. McELFISH: Look at all the documents I have in
2 this case.

3 THE COURT: Then stop it.

4 (Sidebar ends.)

5 (Continued on next page.)

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Bauta - cross - Barmen

1912

1 (Continuing.)

2 THE COURT: Continue.

3 BY MR. BARMAN:

4 Q One of the things you talked about is having ongoing
5 memory issues?

6 A Yes.

7 Q Those issues have gotten better as time has gone on since
8 the accident, not worse?

9 A Since I started seeing Dr. Thomas.

10 Q Do you remember seeing Dr. Goldman? She was a
11 psychologist you were seeing from 110 West 34th Street?

12 A Yes.

13 Q She saw you for the first time on October 17th, eight
14 days after the accident?

15 A Okay.

16 MR. BARMEN: Can we pull up GLI-42637, please. And
17 I believe this is already admitted.

18 THE COURT: What's the exhibit number?

19 MR. BARMEN: This is Defendant's 408.

20 MR. McELFISH: I think it's already admitted under
21 316.

22 MR. BARMEN: It's admitted. May I publish, Your
23 Honor?

24 THE COURT: Yes.

25 (Exhibit published.)

Bauta - cross - Barmen

1913

1 Q Mr. Bauta, one of the things that Dr. Goldman was
2 assessing when you first saw her was your memory.

3 MR. BARMEN: Could you blow up the mental
4 examination paragraph please? Eight days after the accident,
5 Dr. Goldman indicated that both your long-term memory and
6 short-term memory were unimpaired. So certainly eight days
7 after the accident the psychologist that was actually treating
8 you didn't think you had any memory problems, right?

9 MR. McELFISH: Objection, foundation.

10 THE COURT: Overruled.

11 MR. McELFISH: The way it's phrased.

12 THE COURT: Overruled.

13 A I didn't know anything about that. I wasn't told about
14 that. This is my first time hearing about this.

15 Q Well, I think you testified on direct about Dr. Goldman
16 that you went to her because you needed someone to talk to
17 about the issues you were experiencing from the accident;
18 correct?

19 A Yes, correct.

20 Q And I think you said you had several conversations with
21 Dr. Goldman. I think you said you treated with her for close
22 to a year?

23 A Yes, correct.

24 Q And one of the things that you were talking to her about
25 was -- I believe the anxiety and fear you were having reliving

Bauta - cross - Barmen

1914

1 the accident; right?

2 A Yes.

3 Q And you would get nervous when you saw a bus?

4 A Yes.

5

6 (Continued on the following page.)

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Bauta - cross - Barmen

1915

1 (Continuing)

2 Q And based on your testimony during the time you saw her,
3 you were also experiencing the pain from the accident in your
4 back and your legs and your neck; right?

5 A Correct.

6 MR. BARMEN: You can take that down, please.

7 Q While you were treating with Dr. Goldman, you took two
8 separate eight-hour trips on a Greyhound bus; did you not?

9 A I don't remember two.

10 Q Okay.

11 A You can say two; went there and when I came back.

12 Q Actually, no. Two separate round-trips, one in
13 October of 2013, two weeks after the accident, and another in
14 July of 2014.

15 Do you recall that?

16 A No, I don't remember that one.

17 Q Okay.

18 MR. BARMEN: Can you pull up 406-28, please.

19 Same exhibit, Your Honor. And this is part of
20 Goldman's record that are already admitted.

21 May I publish?

22 (Exhibit published.)

23 MR. BARMEN: Thank you.

24 Q Mr. Bauta, there's a record from Dr. Goldman in front of
25 you from October 24th, 2013. The accident was October 9th,

Bauta - cross - Barmen

1916

1 2013; right?

2 A Yes.

3 Q And one of the things you discussed with Dr. Goldman on
4 October 24th was the weekend bus trip to Upstate New York that
5 you took.

6 Do you recall that?

7 A I don't recall that. I don't remember that.

8 Q Well, you said on direct you had a trip where you went
9 eight hours one way and then the next day you came eight hours
10 back.

11 Would that be the trip to Upstate New York?

12 A Probably that was one, yes.

13 Q Okay.

14 A I don't remember exactly what day it was.

15 Q Well, it had to be before October 24th, 2013, because
16 that's when you were discussing with Dr. Goldman; right?

17 A Okay. All right.

18 Q So within two weeks of the accident, you're on another
19 bus.

20 Was it a Greyhound?

21 A Yes.

22 Q And you were able to sit on that bus for eight hours, one
23 way, and turn around the next day and come back eight hours
24 again; right?

25 A Nervous as all heck, yes, I did.

Bauta - cross - Barmen

1917

1 Q Nervous, sure. But you didn't tell Dr. Goldman,
2 according to this record, about being in any pain because of
3 it; true?

4 You would agree it's not in the record.

5 A Yeah, I don't see it.

6 MR. BARMEN: Okay. Can we look at 406-30. Still
7 out of the same exhibit.

8 (Exhibit published.)

9 Q Mr. Bauta, this is a record from Dr. Goldman from
10 July 31st, 2014, discussing a recent eight-hour bus trip to
11 test your current level of anxiety.

12 That was the second one, was it not?

13 A I just don't remember that one, to be honest.

14 Q Okay. But you don't deny that it occurred; right?

15 A If I told her, I just don't remember it.

16 Q Right. But you were always honest with your doctors;
17 correct?

18 A Yes.

19 Q Okay. So that was another trip eight hours one way, turn
20 around, come eight hours back.

21 A Probably, yes.

22 Q And that was in July of 2014, after the accident and
23 before the surgery of May of '15; fair?

24 A Yes.

25 Q And again, in that record, you do in this one, talk about

Bauta - cross - Barmen

1918

1 pain in your back.

2 Do you see that?

3 A Okay.

4 Q But you were able to do the trip; right?

5 A Very uncomfortable and with some pain, yes.

6 Q I thought you didn't remember it.

7 A Well, you're asking, I'm telling you. Because if I did
8 it, I mean, I'm not going to deny that I didn't do it. I'm
9 not going to say that. But if I did it, I did it.

10 Q You were asked about the neuropsychological testing.

11 MR. BARMEN: You can take that down.

12 Q You did some with a Dr. Honor?

13 A Yes.

14 Q Who is a retained expert on your behalf.

15 A Yes.

16 Q A Dr. Morgan, who is a retained expert on behalf of us,
17 the defendants.

18 And Dr. Thomas, your current treating neuropsych;
19 right?

20 A Yes.

21 Q And you stated, I think, that you had to do the entirety
22 of the test with Dr. Morgan in one day.

23 A Yes.

24 Q And it was hard because it was over eight hours.

25 A Yes.

Bauta - cross - Barmen

1919

1 Q Okay. And you don't recall being given the option to
2 break it up into more than one day.

3 A No, I don't.

4 Q Okay. When you tested with Dr. Honor, it was over two
5 days; right?

6 A Yeah.

7 Q Four hours one day and four hours another; fair?

8 A No, it was about two hours a piece.

9 Q So you only tested a total of four hours with Dr. Honor?

10 A No, it was more than that, but it was about two hours a
11 piece.

12 Q Okay. So he broke it up over four separate days?

13 A About, yeah.

14 Q Okay.

15 MR. BARMEN: May I have the ELMO, please.

16 And this was previously shown with Dr. Thomas. It's
17 the Morgan consent letter.

18 THE COURT: Move your notes, please.

19 Hold on.

20 MR. BARMEN: We can pull it up on the small screens,
21 Your Honor.

22 MR. McELFISH: Mr. Barmen, is it admitted?

23 MR. BARMEN: I believe I admitted it with Thomas.

24 THE COURT: What number, please?

25 MR. BARMEN: What is the number?

Bauta - cross - Barmen

1920

1 MR. SAAL: Plaintiff's 412, pages 173 and 174.

2 THE COURT: Is 412 in?

3 MR. BARMEN: I believe it was admitted with
4 Dr. Thomas, Your Honor.

5 MR. McELFISH: Parts of it are in, subject to
6 redaction and discussion.

7 THE COURT: What page again?

8 MR. SAAL: Plaintiff's Exhibit 412, Bates Number
9 0173.

10 THE COURT: 173. 412-173. Do we know?

11 Mr. Barmen, can you clear the line off the screen.

12 THE COURTRoom DEPUTY: We just admitted 412, that's
13 it.

14 THE COURT: Okay. It is in.

15 MR. BARMEN: Okay.

16 (Exhibit published.)

17 MR. BARMEN: Can I have the second page first, 174.

18 (Exhibit published.)

19 MR. BARMEN: Thank you.

20 Can you blow that up for me.

21 BY MR. BARMEN:

22 Q Mr. Bauta, this was part of a consent you signed with
23 Dr. Morgan before the testing started.

24 Is that your signature?

25 A Yes, it is.

Bauta - cross - Barmen

1921

1 Q And you signed that on February 2nd, 2016.

2 A Yes.

3 Q Okay. And you notice under voluntary nature of
4 evaluation, it says: Your participation in this evaluation is
5 voluntary. You are free to discontinue the evaluation at any
6 time.

7 Certainly you read that before you signed it;
8 correct?

9 A Incorrect. I didn't read that. I asked him to explain
10 it to me, because I had issues with reading and he explained
11 to me and I don't remember him explaining that part to me.

12 Q Well, I thought we talked earlier that sometimes you
13 can't read as long as you like, but you are certainly
14 capable --

15 A That's not long. It wasn't a lot, but...

16 MR. BARMEN: Would you go to 173, please, and blow
17 up the last paragraph.

18 MR. SAAL: Can we publish?

19 MR. BARMEN: Yes.

20 Can we publish, Your Honor?

21 (Exhibit published.)

22 Q Sir, you will agree with me that on the bottom of the
23 first page it says: If you become so tired that you prefer to
24 finish on another day, let us know.

25 Again, you didn't read that before you signed this

Bauta - cross - Barmen

1922

1 document?

2 A I did not.

3 Q And it's your position that nobody explained it to you?

4 A I asked for explanations. I asked for them to explain it
5 to me and he explained it to me in the way that he did and I
6 signed it.

7 Q Okay. Well, when he explained it to you, he would have
8 told you, then, that if you get tired, you can finish on
9 another day; right?

10 THE COURT: Sustained.

11 Q Were you told, sir, that if you got tired or were
12 uncomfortable, you could finish on another day?

13 A No.

14 Q You are sure about that?

15 A Yes, I'm sure.

16 Q Is there a reason you didn't read this yourself before
17 you signed it?

18 MR. McELFISH: Objection. Argumentative.

19 THE COURT: Sustained.

20 Q Do you typically sign things without reading them?

21 MR. McELFISH: Argumentative.

22 THE COURT: Sustained.

23 Q Why didn't you read the document before you signed it,
24 sir?

25 MR. McELFISH: Argumentative.

Bauta - cross - Barmen

1923

1 THE COURT: Overruled.

2 A Just wasn't having a good day. I really didn't feel in a
3 -- in a mood to, like, read because I knew I was going to have
4 a long day.

5 Q Did you tell anyone there that you weren't having a good
6 day or weren't feeling well?

7 A No, I just wanted to just do the test then.

8 Q Did you tell anyone at the break that you were
9 uncomfortable and had to take pain medication?

10 A No.

11 Q Did you ask anyone if you had the option to do it some
12 other time?

13 A No, I did not.

14 Q Do you know if the results of your testing with
15 Dr. Morgan were any different than the results of the testing
16 with Dr. Honor done over four days?

17 MR. McELFISH: Foundation.

18 THE COURT: Overruled.

19 Do you know?

20 THE WITNESS: No, I don't.

21 MR. BARMEN: You can take that down, please.

22 Q Understanding that you've stopped going to physical
23 therapy, are you still only treating with Dr. Thomas and
24 Dr. Cordiale?

25 A Yes.

Bauta - cross - Barmen

1924

1 Q And when's the last time you saw Dr. Cordiale?

2 A It was last month.

3 Q And when's the next appointment with Dr. Cordiale?

4 A I have to schedule one.

5 Q Has Dr. Cordiale ever indicated to you when or if you
6 could stop going to see him?

7 A No, not yet.

8 Q Isn't it true, though, sir, that sometimes when you go
9 there, you don't even see Dr. Cordiale, he see a physician's
10 assistant?

11 A It happened about twice, yeah.

12 Q That's all, just twice? Every other time you see
13 Cordiale?

14 A Usually it's Cordiale, yes.

15 Q And when you go there, how long are you there?

16 A It all depends.

17 Q Typically.

18 A If it was crowded, I could be there for like three, four
19 hours.

20 Q And that's fair and I think that's my fault.

21 When you actually are in to see the doctor, how much
22 time do you spend with Dr. Cordiale on a typical visit?

23 A About 15, maybe 20 minutes.

24 Q Okay. And is that just a situation where he takes a look
25 at you, you guys have a talk and then you leave?

Bauta - cross - Barmen

1925

1 A I explain to him -- pretty much, yeah, I explain to him
2 how I'm feeling; how things are, you know, progressing from
3 what I feel and he take his notes.

4 He show me on the computer what's what, from the --
5 the disc and then he lets me know if he needs to see me again
6 or not.

7 Q Okay. We've already established that you are doing as
8 well or better than you were a year ago; correct?

9 A Yes.

10 Q Okay. Well, isn't it true that your knees are fine?

11 A My, yes. So far, yes.

12 Q Okay. And as it relates to your neck, all you deal with
13 is just a little bit of stiffness; right?

14 A Yes. There's stiffness when I turn left or right, yes.

15 Q Slight stiffness; correct?

16 A Well, it all depends on how I feel from the other pains
17 in my back.

18 MR. BARMEN: Can we pull up depo three, page 93.

19 MR. McELFISH: One second.

20 THE COURT: Can you give me an exhibit number,
21 please.

22 MR. SAAL: 334, Your Honor.

23 THE COURT: You are pulling it up?

24 MR. SAAL: Yes.

25 MR. McELFISH: I'm sorry. What page number?

Bauta - cross - Barmen

1926

1 MR. BARMEN: Page 93 of the third deposition from
2 April of last year, starting at line 15, going down to
3 page 94, line 3.

4 THE COURT: Okay.

5 Q Sir, you were deposed in April. Do you remember being
6 asked:

7 "QUESTION: By the way, I'm looking at you. You
8 don't have any problem moving your neck, do you?"

9 Do you recall answering: "It's a slight stiffness."

10 THE WITNESS: Yeah.

11 "QUESTION: But other than the slight stiffness, you
12 got nothing else going on there?

13 "Objection.

14 "QUESTION: Other than the slight stiffness, you
15 don't have any other complaints about your neck; correct?"

16 Your answer was: "Just slight stiffness."

17 MR. McELFISH: Going on to the next page, next
18 question and answer, Judge, to complete it? Or I can do it on
19 recross.

20 MR. BARMEN: Fine.

21 THE COURT: Pull it up a little bit, I cannot see
22 the whole thing.

23 MR. McELFISH: Going to line 4, 5 and 6.

24 MR. BARMEN: I'll read it.

25 THE COURT: Fair.

Bauta - cross - Barmen

1927

1 BY MR. BARMEN:

2 Q Next question. "You can turn your at the end head to the
3 left and right?

4 "ANSWER: Not like I used to."

5 That was your testimony back in April; correct?

6 A Correct.

7 Q So you can't turn it like you used to, but all you are
8 really dealing with is slight stiffness; fair?

9 A Yeah.

10 Q And likewise, at the same time you testified relative to
11 your back, that you're just dealing with some stiffness now.

12 Do you recall that?

13 MR. McELFISH: Improper impeachment.

14 THE COURT: Sustained.

15 Q Sir, aren't you just dealing with stiffness in your back
16 these days?

17 A Muscle spasms and some sharp tingling sensations and
18 tightness.

19 MR. BARMEN: Page 95, starting at 25, going on to
20 96, through 3.

21 THE COURT: Take that blow-up away, please.

22 MR. McELFISH: Just note my objection to time frame,
23 time period.

24 THE COURT: Sustained.

25 MR. BARMEN: No?

Bauta - cross - Barmen

1928

1 Q Sir, how many times a week do you typically use your cane
2 now?

3 A It all depends. It starts from when I wake up and how I
4 feel.

5 Q Isn't it true that you really only use it three or four
6 days a week?

7 A Not necessarily. Depends on how I feel when I wake up
8 for the day.

9 Q Four days a week?

10 A It all depends on how I feel when I wake up.

11 MR. BARMEN: Same depo, page 18, please.

12 MR. McELFISH: Line?

13 MR. BARMEN: Oh, wait. I'm in the wrong depo. Hang
14 on. Sorry.

15 It's the third depo. I was in the second depo, I
16 apologize. It is page 18.

17 THE COURT: Sustained. Sustained. It is not
18 impeachment.

19 BY MR. BARMEN:

20 Q The back brace that you say you wear when you're not
21 using your cane, is it bulky?

22 A It's pretty bulky, yeah.

23 Q Can you see it under your clothes?

24 A It all depends on what I'm wearing. If I'm wearing just
25 a T-shirt, you can see it.

Bauta - cross - Barmen

1929

1 Q No question in your mind you were wearing it on the days
2 we had you under surveillance?

3 A If I have my cane, I have my back brace.

4 Q I want to go back a little bit and talk about your memory
5 issues.

6 You say you forget things.

7 A At times, yes.

8 Q Okay. But you're helping your father by scheduling his
9 appointments; correct?

10 A Yes.

11 Q And you get him his appointments.

12 A Yes.

13 Q And you help him with his medications.

14 A Yes.

15 Q And he takes over ten medications; correct?

16 A Yes. Yes; correct.

17 Q But you don't keep any kind of log or journal, you just
18 manage it; right?

19 A It's not that hard. I schedule his -- right after one
20 appointment, right there at the office, I schedule his next
21 appointment.

22 Q Okay. And how do you keep his medications straight?

23 A His medication, he has, you know, a box, for the week,
24 Monday, Tuesday, Wednesday, Thursday, Friday, Saturday and
25 it's all separated already; daytime, nighttime.

Bauta - cross - Barmen

1930

1 Q You're the one that does the separation; right?

2 A Yes.

3 Q You're the one that prepares it.

4 A Yes.

5 Q And you don't have any kind of log or guideline or
6 anything written down for that; fair?

7 A No, I don't.

8 Q Okay. You cook and clean for your dad?

9 A Well, all depends. The cleaning, sometimes my sister
10 will come over and she'll help.

11 Q Do you cook and clean for your dad at all, sir?

12 A Yes, I do.

13 Q Do you do his laundry along with yours?

14 A Yes, it's not a lot.

15 Q Okay. But you do your laundry and you do his laundry.

16 A Yes.

17 Q And you were able to go with him to his appointments.

18 A Yes.

19 Q You are able to make it to your appointments.

20 A Yes.

21 Q When you go into the City to go to West 34th Street --
22 well, when you were going in to still treat at West
23 34th Street, it was a 45-minute commute; right?

24 A It still is.

25 Q Okay. Who are you still seeing at West 34th Street?

Bauta - cross - Barmen

1931

1 A Dr. Thomas.

2 Q Dr. Thomas is at West 34th Street?

3 A Correct.

4 Q Since when?

5 A Since I started.

6 Q Okay. Got you.

7 He's not at 110 West 34th Street. He's separate
8 from that office; correct?

9 A Yes. Yes.

10 MR. BARMEN: Okay. It confused me there for a
11 minute.

12 Q Let's talk about 110 West 34th Street, since we're on the
13 subject.

14 A Okay.

15 Q I think you testified on direct examination that your
16 sister Maria referred you there?

17 A Yes.

18 Q Your sister Maria testified yesterday.

19 A Okay.

20 Q She said she didn't know how you got there.

21 A How I get there?

22 Q How you got to west -- how you came to treat at West
23 34th Street. She didn't know. She didn't refer you there.

24 A She's the one that told me to go there.

25 MR. BARMEN: Can I have the ELMO, Your Honor.

Bauta - cross - Barmen

1932

1 Q I asked your sister yesterday --

2 MR. McELFISH: Objection.

3 THE COURT: Wait. Wait.

4 (Pause in the proceedings.)

5 THE COURT: This is not impeachment. The jury
6 will -- it is up to the jury to determine what Ms. Bauta said
7 or did not say.

8 Mr. Bauta was not here for that testimony so he does
9 not know.

10 BY MR. BARMEN:

11 Q Are you sure it wasn't attorney Colbert that referred you
12 to west -- to 110 West 34th Street?

13 A It was my sister.

14 Q Did you talk to your sister after her testimony
15 yesterday?

16 A No, I did not.

17 Q At 110 West 34th Street you treated with Dr. McGowan;
18 correct?

19 A Yes.

20 Q She is a chiropractor.

21 A Yes.

22 Q You treated with Dr. Winn.

23 A Yes.

24 Q Pain management.

25 You treated with doctors Liebowitz and Capiola,

Bauta - cross - Barmen

1933

1 they're orthopedics; right?

2 A Quite a few doctors, yes.

3 Q And Liebowitz and Capiola were treating you for your
4 knee, not anything to do with your back; fair?

5 A Yes.

6 Q Dr. Russo, a chiropractor, also at West 34th Street?

7 A Yeah, yes.

8 Q Dr. Goldman, the psychologist at West 34th Street?

9 A Psychologist you said; right? Yeah.

10 Q Yeah, she's the one with bus trips.

11 A Yeah.

12 Q Dr. Gutstein, a neurologist, at West 34th Street?

13 A Seen quite a few doctors.

14 Q Dr. Gutstein you saw at West 34th Street; right?

15 A Most likely, yes. If he was there, I seen him, most
16 likely.

17 Q Physical therapist by the name of Dr. Vasile, you saw him
18 there as well?

19 A I seen a few doctors. Like I said before, I -- I don't
20 really remember the names. But if the doctor was there, most
21 likely I seen the doctor.

22 Q Dr. Alladin?

23 A Like I said, if the doctor was there, most likely I seen
24 the doctor.

25 Q How did you get from one to the other, because they're

Bauta - cross - Barmen

1934

1 different types of practitioner?

2 A But they're all on the same floor and one refers me to
3 the other.

4 Q Right. And, in fact, you go in to one door and there's a
5 receptionist for all of them; fair?

6 A Yeah. You could say that, yeah.

7 Q You had some imaging done at Precision Imaging, the MRIs
8 that the jury's seen.

9 Do you know if Precision Imaging is affiliated with
10 110 West 34th Street?

11 A Okay.

12 Q I'm sorry?

13 A Okay.

14 Q Do you know if they are?

15 A Well, that's where they sent me. So I'm guessing yes.

16 Q Do you know what percentage of patients treated at 110
17 West 34th Street are involved in litigation?

18 MR. McELFISH: Objection.

19 THE COURT: Sustained.

20 Q Your sisters were informed about the accident roughly
21 three days after the accident?

22 A Say that again.

23 Q Your sisters. You informed your sisters of the accident
24 three days after the accident; is that your recollection?

25 A Yes.

Bauta - cross - Barmen

1935

1 Q Okay. And your sister Maria took some pictures of the
2 laceration on your head and some bruising. We saw those
3 pictures during your direct.

4 Those were her pictures; right?

5 A Yes.

6 Q She said she took pictures of your back. Have you ever
7 seen her pictures of your back?

8 A I didn't see all the pictures that she took.

9 Q Have you ever seen a picture of your back that your
10 sister took close in time to the accident?

11 A I didn't see all the pictures she took.

12 Q So is the answer to my question, no, you haven't?

13 THE COURT: Did you see any of the pictures,
14 Mr. Bauta?

15 THE WITNESS: Yeah, I seen some of the pictures.

16 Q Did you see any of the pictures that she took
17 specifically of your back?

18 A I didn't see of my back.

19 Q You said on direct that you were experiencing horrible
20 pain like you've never experienced before in your back on
21 October 10th, the day after the accident.

22 Is that your recollection?

23 A Yes.

24 Q Why didn't you tell any of your medical treaters about
25 any back pain until October 17th?

Bauta - cross - Barmen

1936

1 A When I seen any doctor, I specifically said pretty much
2 my whole body hurts. I wasn't directly, like, pointing at a
3 certain place. I just said my body hurts and I needed help.

4 Q Well, when you went to the emergency room, you
5 specifically told them your back didn't hurt, didn't you?

6 A Not necessarily. I said my body. I have body pains. My
7 body hurts. That's what I said.

8 Q Well, at Brookdale on October 10th, you certainly said
9 you had whole body pain. But to the EMS workers at the scene
10 you denied back pain; did you not?

11 A You just asked me about Brookdale.

12 Q Then I apologize. Let's make sure we're on the same
13 page. Let's start with the day of the accident, the EMS
14 workers.

15 You specifically denied back pain to them; did you
16 not?

17 A I don't know what I said to them, to be honest. I spoke
18 to them. I know I did. But what exactly I said to them, I
19 don't remember.

20 Q Okay. And that's fair.

21 And then you were taken to Evangelical Hospital ER
22 and you specifically denied back pain to the doctors in the
23 ER; did you not?

24 A And same thing. I spoke to people, but what I said, I
25 don't remember what I said.

Bauta - cross - Barmen

1937

1 Q But you do remember what you said when you went to
2 Brookdale on October 10th; true?

3 A Well, that I have body pain.

4 Q So yes, you remember what you said at Brookdale; is that
5 accurate?

6 A I didn't pinpoint. I said body pain. I remember that.
7 I said body pain.

8 Q So the point is that, you remember; correct?

9 A Yes.

10 Q Okay. But you didn't tell somebody specifically you had
11 back pain until October 17th; correct?

12 MR. McELFISH: Asked and answered.

13 THE COURT: Overruled.

14 A Yeah. The thing is, when I started my -- saying that I
15 have back pains was because my back was starting to feel
16 worse. First, I was able to deal with it somewhat, and then
17 after a while, I couldn't deal with it anymore and that's when
18 I started saying something about it.

19 Q Okay.

20 MR. BARMEN: Pull up 409-45, small screens, please.

21 This is from exhibit 413, Your Honor. It's already
22 been admitted.

23 MR. McELFISH: Do you have the 413 page number?

24 MR. BARMEN: 409-45. It was the one that's been
25 redacted.

Bauta - cross - Barmen

1938

1 MR. McELFISH: Hold on.

2 MR. BARMEN: It's this one. This was redacted.

3 MR. McELFISH: Yes, I remember.

4 It's in.

5 MR. BARMEN: May I publish, Your Honor? Okay.

6 (Exhibit published.)

7 MR. BARMEN: Can you blow that up a little bit,
8 please.

9 BY MR. BARMEN:

10 Q Mr. Bauta, do you recognize this document as your initial
11 intake at 110 West 34th Street on October 16th, 2013?

12 A I mean my name is on there.

13 Q It says date of accident, 10/9/13?

14 A Okay.

15 Q And was that your address at the time?

16 A Yes.

17 Q And the date of first visit, 10/16/13?

18 A All right.

19 Q Okay. And down under attorney it says Colbert. Who is
20 Mr. Colbert?

21 A The attorney that I looked up.

22 Q Had you already retained him at that point?

23 A By the time I went to go see the doctors, yes.

24 Q Okay. In fact, that's him right there; right?

25 A Yes.

Bauta - cross - Barmen

1939

1 Q Is it your position that he didn't send you to 110 West
2 34th Street?

3 A It was my sister.

4 MR. BARMEN: Can we pull up 422-68, small screens
5 only.

6 MR. McELFISH: Does that have a plaintiff exhibit?

7 MR. BARMEN: Defendant's Exhibit 429.

8 THE COURT: Defendant's Exhibit 429?

9 MR. BARMEN: Yes, Your Honor.

10 THE COURT: What page?

11 MR. BARMEN: 422-68. It should be the first page of
12 that exhibit.

13 It is on the small screen now, Your Honor.

14 THE COURT: Okay. It is not the first page of my
15 Exhibit 429, just so you know.

16 MR. BARMEN: I apologize. It is the first one I
17 have. But it is 422-68 is the page.

18 THE COURT: Okay.

19 MR. BARMEN: I'm sorry. It's 115 of the exhibit. I
20 apologize. I was not aware.

21 THE COURT: Okay.

22 MR. BARMEN: I'm sorry.

23 THE COURT: It is up; right?

24 MR. BARMEN: I'm sorry. I was waiting for you.

25 May I publish?

Bauta - cross - Barmen

1940

1 (Exhibit published.)

2 MR. BARMEN: Thank you.

3 BY MR. BARMEN:

4 Q Mr. Bauta, I apologize for the delay. I was waiting for
5 something and that was my fault.

6 This, again, is a document from New York Medical
7 Rehabilitation Center and it's part of the chart of a
8 Dr. Vincent Vasile.

9 What is he one of the first people you treated with
10 when you went to that facility?

11 A Probably, yes.

12 Q Do you recall?

13 A It was a few doctors, like I keep saying.

14 Q Well, again, you'll notice the date is 10/16, 2013.

15 A Okay.

16 Q Seven days after the accident; correct?

17 A All right.

18 Q And again, it notes that attorney Colbert on the
19 document.

20 Do you know why that is?

21 A Because there was a lien.

22 Q There was already a lien seven days after the accident?

23 MR. McELFISH: Argumentative.

24 THE COURT: Overruled.

25 A When I went there, they asked me if I had an attorney.

Bauta - cross - Barmen

1941

1 Q Okay. Was that a standard question they asked when you
2 went to do intake?

3 MR. McELFISH: Foundation.

4 THE COURT: Sustained.

5 Q Have you ever been sent a bill for any of the treatment
6 you received at 110 West 34th Street?

7 A No.

8 Q How did you come under the care of New York Spine
9 Specialists, Dr. Cordiale?

10 A Well, I was looking for a second opinion and I don't know
11 exactly how I ended up going there, but I was talking to -- I
12 forgot his name. It was one doctor I was seeing before him.
13 And he requested I see Cordiale.

14 Q Did he specifically refer you to Cordiale or Lattuga or
15 the practice in general, if you recall?

16 A I don't get what you're trying to say, because I think I
17 just answered your question.

18 Q Okay. So I understand, someone you know specifically
19 said you should go see Andrew Cordiale?

20 A That's not what I said.

21 Q Then I apologize. Let's step back and try and do this
22 again.

23 You did come under the care of New York Spine
24 Specialists and specifically, Dr. Cordiale; right?

25 A Yes. Eventually, yes.

Bauta - cross - Barmen

1942

1 Q And before that happened, you saw Dr. Mikelis in
2 Brooklyn, who assessed you initially; is that fair?

3 A Yes.

4 Q And Dr. Mikelis saw you one time and then sent you to
5 Dr. Cordiale?

6 A Yes.

7 Q How did you get to Dr. Mikelis to become a patient of New
8 York Spine?

9 A I don't remember. I -- I do remember that I was asking
10 questions for a second opinion, just in case I wanted the
11 surgery.

12 Q Well, who gave you --

13 A I was asking questions, but I don't know exactly how I
14 ended up there. But when I went there, I saw -- which I
15 thought was Dr. Lattuga. And then he referred me to Cordiale.

16 Q So you thought the first person you saw was Dr. Lattuga?

17 A Yes.

18 Q And you later realized it was Dr. Mikelis?

19 A Yeah, because when I left from there, I was reading the
20 business card and his name just stood out. So I thought it
21 was him the whole time.

22 Q And it's fine.

23 But you say that you wanted a second opinion?

24 A Yes.

25 Q From a surgical spine standpoint, who gave you the first

Bauta - cross - Barmen

1943

1 opinion?

2 A I don't -- you kind of lost me there.

3 Q You went to Dr. -- you ended up at New York Spine for a
4 second opinion relative to whether or not you should have
5 surgery; right?

6 A Yes.

7 Q Who was the first doctor that told you that spine surgery
8 might be a consideration?

9 A I was talking to Dr. Winn.

10 Q Okay. But you don't know if it was Dr. Winn that
11 actually sent you to New York Spine?

12 A No, I'm not sure.

13 Q Okay. Have you ever received a bill from New York Spine
14 for the services provided to you?

15 A No.

16 Q Did you ever talk to Dr. Lattuga or anybody else at New
17 York Spine about trying to negotiate the costs for a surgery?

18 A No. When I got there, they asked if I had Medicaid. And
19 I gave them my card.

20

21 (Continued on following page.)

22

23

24

25

Bauta - cross - Barmen

1944

1 BY MR. BARMEN: (Continuing)

2 Q At some point, sir, did you or anybody from your family
3 on your behalf negotiate with New York Spine about a special
4 rate for the procedure?

5 A No, not to my knowledge, no.

6 (Continued on next page.)

7

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Side Bar

1945

1 MR. BARMEN: Can we pull up on the small screens
2 only Exhibit 431, page 41, Your Honor.

3 MR. McELFISH: Objection. Side bar?

4 THE COURT: Sure.

5 (The follow occurred at side bar.)

6 MR. McELFISH: The reason for the side bar, Judge,
7 is this is a document that has to do with payment reduction, I
8 don't know if it was by a factoring company or Medicaid or
9 whatever it is, but it was appropriate for post trial
10 evidentiary hearings rather than -- this witness, A, has no
11 foundation and B, the motion in limine, and I think we
12 discussed this again the other day when we talked about the
13 4545 hearings.

14 MR. BARMEN: Your Honor, our position is this is not
15 a reduction. This was a negotiation. This is the cost of the
16 procedure and they now want to put in front of a jury or have
17 put in front of the jury that it was \$170,000 when they knew
18 they had worked out ahead of time the entire surgery including
19 the revision would be 30 grand.

20 MR. McELFISH: This is a violation of New York law.
21 This is something for you to consider.

22 THE COURT: Does he know?

23 MR. BARMEN: I don't know. I'll find out.

24 THE COURT: I will let you ask him without talking
25 numbers or referring to it. He can see the document but if he

Side Bar

1946

1 does not know what this is, then you can't ask him questions
2 about it.

3 MR. McELFISH: And would counsel be directed to ask
4 just the witness --

5 MR. MANNION: Your Honor, if we can address two
6 issues while we're up here.

7 THE COURT: Are we done with this issue?

8 MR. BARMEN: You told me I can ask if there was a
9 deal worked out.

10 THE COURT: Have you seen this document before and
11 do you know if there was a deal worked out with the cost of
12 your surgery.

13 MR. BARMEN: Okay.

14 MR. MANNION: There have been some objections on
15 improper impeachment, Your Honor, and this is a party.
16 Rule 32 and also the rules of evidence, we can use the
17 deposition of a party since we're an adverse party for any
18 purpose. It doesn't have to be impeachment.

19 THE COURT: The problem --

20 MR. MANNION: He's an adverse party. It's an
21 admission.

22 THE COURT: The problem with the deposition
23 transcripts that you're referring to, you asked how are you
24 feeling today.

25 MR. MANNION: No, I understood that position.

Side Bar

1947

1 THE COURT: So that's not coming in.

2 MR. MANNION: No. No.

3 THE COURT: The other one was similar and if you
4 look at the colloquy, he says, yes, that's different. I got
5 this. I forget exactly what it was but it was not at all
6 inconsistent with what he is saying.

7 MR. MANNION: What I'm trying to say is I don't
8 think to use this, I don't think it has to be inconsistent but
9 I understand your ruling.

10 THE COURT: You're right, it doesn't have to be
11 inconsistent, but why are we wasting time on reaffirming what
12 he said on the stand?

13 MR. MANNION: The other thing is I wanted to just
14 point out for the record and we would ask you to reconsider
15 this on the Save-A-Lot. On July 30th of 2017, in Dr. Morgan's
16 report which was given to Mr. McElfish who had chance to look
17 through those materials, right in there, on a job application
18 from Save-A-Lot. Mr. Bauta checked "no" to the question had
19 he ever been convicted. Four months later or so, five months
20 later, Mr. McElfish for the plaintiff deposed Dr. Morgan. He
21 didn't ask him any questions about it. They had been aware of
22 this forever.

23 MR. McELFISH: My question, Mr. Mannion, is --

24 MR. MANNION: That's the entire file.

25 MR. McELFISH: Hold on. Let me speak.

Side Bar

1948

1 MR. McELFISH: If you gave me more, I understand,
2 but did you give the application in discovery or along with
3 Dr. Morgan's report?

4 MR. BARMEN: Yes, on both.

5 MR. MANNION: You had that. His entire file was
6 there.

7 MR. McELFISH: I never actually had a file.

8 MR. MANNION: For him to come up here and claim it's
9 the first time he saw it, it's not correct.

10 MR. McELFISH: You still haven't shown you've
11 provided it. All you've shown me is his report. And,
12 honestly, if I was trying to get something in, Judge, and he
13 said he didn't see it, you would ask me to show where I
14 provided it to them. That's all I'm asking.

15 MR. MANNION: I don't have all those documents on
16 me, but we had it in there. It's in the pretrial submissions.
17 It was here July 2017. He's never objected to it and he's --
18 it's unbelievable to me.

19 THE COURT: I mean, you don't have a series of cover
20 letters that say, Enclosed herewith?

21 MR. BARMEN: I'm sure we do.

22 THE COURT: Document 123 to 456.

23 MR. MANNION: Well, it was at --

24 THE COURT: That was --

25 MR. MANNION: It was at Dr. Morgan's deposition. He

Side Bar

1949

1 had his whole file there. So it was certainly there in
2 July 2017.

3 THE COURT: Wait. It was at Dr. Morgan's
4 deposition? It was in Dr. Morgan's file?

5 MR. MANNION: In his report. It was produced in
6 discovery too, but in his file, in his report, and
7 Mr. McElfish had ample opportunity --

8 THE COURT: It doesn't mean it was produced in
9 discovery. If it was produced in his report, could you have
10 given it to him?

11 MR. MANNION: What I'm saying is he had in his
12 entire file which included the Save-A-Lot records. In
13 addition to discovery, at a minimum he had it when he took his
14 deposition. He's acting like this was the first time he ever
15 heard of it. It was in the report. It's in their file at the
16 deposition. He marked his file.

17 THE COURT: Do we have in Dr. Morgan's deposition
18 transcript in here somewhere --

19 MR. BARMEN: Yes, Your Honor.

20 MR. MANNION: I don't know if we have all the
21 exhibits.

22 THE COURT: -- where his entire file was marked?

23 MR. BARMEN: You will see in the deposition where
24 his file was marked.

25 MR. McELFISH: Is it in there?

Side Bar

1950

1 MR. MANNION: Yes, the Save-A-Lot is in there.

2 MR. McELFISH: Is it in Dr. Morgan's materials?

3 MR. MANNION: I don't know if.

4 THE COURT: Is this really that big a deal? You
5 want to ask him if he lied on the Save-A-Lot application?

6 MR. BARMEN: I'm kind of past that.

7 THE COURT: Then why are we talking about it?

8 MR. MANNION: What I want is Mr. McElfish to stop
9 making these representations.

10 THE COURT: That's what I want too and I have asked
11 him several times and he says I am insulting him on the record
12 and I don't think I am. No one make definitive statements on
13 the record that you cannot back up. Don't write the check.

14 MR. McELFISH: So then, Judge, where is it in
15 Morgan's materials? He kind of avoided that.

16 MR. MANNION: I'm not avoiding it.

17 THE COURT: We are done with this issue. We are
18 done with this issue.

19 (In open court; side bar ends.)

20 THE COURT: Mr. Barmen, how much longer do you have?

21 MR. BARMEN: 20 minutes-ish. Now is a fine time to
22 break.

23 THE COURT: Let's take our mid-afternoon break for
24 15 minutes.

25 (Jury exits.) (Recess taken.)

1951

1 (In open court; jury present.)

2 THE COURT: You may be seated.

3 Continue, Mr. Barmen.

4 MR. BARMEN: Thank you, Your Honor. Just some
5 housekeeping.

6 At this time, defendants would move to enter
7 Exhibit 408, page 4627, 628 and 630. Those are records from
8 Dr. Goldman's.

9 MR. McELFISH: Can I see them?

10 MR. BARMEN: Of course.

11 THE COURT: Plaintiff's or Defendants'?

12 MR. BARMEN: Defendants' 408.

13 MR. McELFISH: That's fine. No objection at all.

14 THE COURT: Received.

15 (Defendants' Exhibit 408 so marked.)

16 MR. BARMEN: Thank you. And likely Defendants' 429
17 which is GLI 42268.

18 MR. McELFISH: No objection.

19 THE COURT: Received.

20 (Defendants' Exhibit 429 so marked.)

21 (Continued on next page.)

22

23

24

25

Bauta - cross - Barmen

1952

1 BY MR. BARMEN: (Continuing)

2 Q Mr. Bauta, I just want to go back and clear one thing up
3 before we move forward to try to wrap this up. I asked you
4 once who referred you to 34th Street. You said it was your
5 sister Maria?

6 A Yes.

7 MR. BARMEN: Okay. Can we go to Depo 2, page 65.
8 Depo 2, December 18th, '15, page 65.

9 MR. McELFISH: One moment.

10 MR. BARMEN: 34021 is the Bates stamp. Page 65,
11 line 14, and actually, if you start up at 4, it will give you
12 the full context.

13 THE COURT: Just that page?

14 MR. BARMEN: Yes, Your Honor. May I proceed?

15 THE COURT: Fine.

16 Q Sir, when I asked you during your deposition -- well, I'm
17 sorry, when Harold asked you at your deposition on
18 December 14th who referred you to 34th Street --

19 MR. McELFISH: Objection. Improper impeachment.

20 THE COURT: Sustained. Were you asked.

21 Q Were you asked: Who referred you to 34th Street?

22 Did you answer: I don't remember exactly who but I
23 was mentioning that I just didn't feel right?

24 Is that your testimony on December 15th?

25 A Yes, that's what it says there.

Bauta - cross - Barmen

1953

1 MR. BARMEN: Let's pull up GLI404, 40236. These are
2 the Brookdale records.

3 MR. McELFISH: What's the date of the record?

4 MR. BARMEN: This is 2/19/14, Brookdale Hospital.
5 Defendants would move to admit.

6 THE COURT: It's already admitted.

7 MR. BARMEN: The whole Brookdale is in?

8 THE COURT: Yes.

9 MR. BARMEN: Can I put it up, Your Honor?

10 Q Sir, on December 19, 2014, did you go to Brookdale
11 Hospital complaining of leg pain because you fell on ice?

12 A Yes.

13 Q And I think actually on direct examination, you stated
14 that you were walking without your cane at that day and you
15 stepped over a snow bank?

16 A Yes.

17 Q And slipped?

18 A That's not what I said.

19 Q What did you say?

20 A I said I was walking without my cane, I stepped over a
21 snow bank leading with my left and my right leg gave out.
22 That's what I said.

23 Q Well, if you're walking without your cane in February
24 stepping over a snow bank, ten months before your surgery,
25 were you feeling pretty good that day?

Bauta - cross - Barmen

1954

1 A Pretty good, yes.

2 Q Okay. And you say your left leg gave out?

3 A I said my right leg.

4 Q Your right leg gave out?

5 A Yes.

6 Q Numbness and weakness?

7 A Yes.

8 MR. BARMEN: Turn to page 40237. Can you highlight
9 that at the bottom, please: Patient is 38-year old male.

10 Q Sir, you denied loss of consciousness, numbness and
11 tingling at the ER that day, correct?

12 A Did I deny it? I was never asked.

13 Q You certainly didn't tell anyone there that you fell
14 because you had numbness or weakness in your right leg, did
15 you?

16 A I told them specifically that my leg gave out.

17 MR. BARMEN: Okay. Go to the next page, 40238,
18 please, and where it says, "Associated Symptoms." Thank you.
19 And highlight "Associated Symptoms." Thank you.

20 Q Sir, in that visit after you went over the snow bank, you
21 indicated no back pain, no decreased radial motion, no muscle
22 weakness, no neck pain, no numbness, no swelling, no tingling.
23 Is that what you told them that day?

24 A No, that's incorrect. That's not --

25 Q So the record is wrong?

Bauta - cross - Barmen

1955

1 A That's not what I told them. That's what they put down.
2 There is times where they'll put down, if you don't say
3 anything, that there's no whatever it is.

4 Q But if you went there because your leg gave out because
5 of numbness and weakness, why would you say nothing?

6 A I told them my leg gave out.

7 Q History reviewed: No pertinent medical history. That's
8 what it reflects, correct?

9 A No medical history.

10 MR. BARMEN: The next page, 40239. Can you
11 highlight "musculoskeletal" at the top, please. Thank you.
12 Under "musculoskeletal," positive for stiffness, negative for
13 myalgias, back pain, left knee tenderness. Now, close that
14 out, please, and highlight "physical exam" for me. Thank you.

15 Q On February 14th, when you were at the ER for slipping on
16 ice, you indicated your neck, normal range of motion, neck
17 supple, correct?

18 A I don't understand what you're saying.

19 Q You see what's highlighted there?

20 You weren't complaining of neck pain that day; they
21 checked your neck and it was fine, right?

22 A They never checked my neck.

23 Q Under "neurological," you were alert and oriented, no
24 cranial nerve deficit. Do you see that?

25 A Where?

Bauta - cross - Barmen

1956

1 Q Do you see that? (Indicating.)

2 A Yes, I see it.

3 Q Have you -- can you point to one medical record since the
4 accident that shows any type of neurological deficit that
5 wasn't by someone that was retained as an expert on your
6 behalf?

7 MR. McELFISH: Objection. Argumentative.

8 THE COURT: Sustained.

9 Q Are you aware of any record, medical record from a
10 treater that indicates any type of neurological deficit?

11 A From my head?

12 MR. McELFISH: Objection as to neurological deficit
13 for this witness.

14 THE COURT: Sustained.

15 Q Are you aware of any medical record that indicates any
16 type of problem with cognition, your level of understanding?

17 MR. McELFISH: Same objection.

18 THE COURT: Overruled.

19 A I never had an issue with my head prior to this accident.

20 Q I'm sorry?

21 A I never had an issue with my head, with no part of my
22 body until this accident.

23 Q I'm asking, sir, are you aware of one medical record that
24 doesn't come from someone that's retained as an expert that
25 indicates that?

Bauta - cross - Barmen

1957

1 MR. McELFISH: Objection, other than Dr. Thomas.

2 THE COURT: Overruled.

3 A I'm pretty sure I just answered that question just now.

4 Q Is it true this you're not aware of any such record?

5 A Yes, I'm aware of that.

6 MR. BARMEN: Let's go to March 22nd, first on the
7 small screen until proper reduction is made.

8 MR. McELFISH: Yes, the proper redaction must be
9 made.

10 Q While they're doing that and, again, I'm trying not to
11 get any more personal than I have to, but since this accident,
12 you have not been able to engage in sexual intercourse, is
13 that true?

14 A Since this accident? From the accident, I was having
15 sexual intercourse.

16 Q Since the accident, you were?

17 A Yes, I was.

18 Q Did you testify in deposition that you weren't?

19 MR. McELFISH: Objection. Improper impeachment.

20 MR. BARMEN: Just trying to move this along.

21 THE COURT: Overruled.

22 A At one point, I did.

23 Q So under oath, you testified untruthfully, fair?

24 A Incorrect.

25 MR. McELFISH: Objection. Argumentative.

Bauta - cross - Barmen

1958

1 THE COURT: Overruled.

2 Q That's incorrect?

3 A Incorrect.

4 Q So it's just a recent change?

5 A When the question was asked the first time, I said in my
6 deposition that I was involved with someone. The next
7 deposition, that's when it was asked again and I said no, I'm
8 having issues with it.

9 MR. BARMEN: Depo 2, page 162 -- I'm sorry. 163,
10 lines 8 through 12.

11 MR. McELFISH: Can you give the date of deposition,
12 please?

13 MR. BARMEN: December 15th of '15 -- I apologize.
14 December 18th of '15.

15 MR. McELFISH: Thank you. No objection. Go ahead.

16 THE COURT: You can ask.

17 Q Sir, were you asked at that deposition:

18 Question: After the accident, were you sexually
19 active up until today's date from October 2003 up until
20 whatever today's date is?

21 Your answer was no, right?

22 A That was a confusion right there.

23 Q That was what?

24 A A confusion. Because my first deposition, I was asked
25 and I, and I said I was involved.

Bauta - cross - Barmen

1959

1 Q Well, this was your second deposition, sir, almost a year
2 later.

3 A Yes, and if I misunderstood, then it's my fault and I
4 apologize, but the way I took it was that you were -- I don't
5 remember his name was asking me from, since my first
6 deposition until the present time. If I misunderstood it,
7 then I apologize.

8 Q No need to apologize. Let's move on.

9 (Continued on next page.)

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Side Bar

1960

1 MR. BARMEN: Let's go to that medical record, March
2 22nd, with the redaction.

3 MR. McELFISH: Can I see it on the small screen so I
4 can see the redaction?

5 MR. BARMEN: It's there.

6 MR. McELFISH: Where, history?

7 MR. BARMEN: Yes, it would have been top right
8 corner.

9 MR. McELFISH: Side bar.

10 (The following occurred at side bar.)

11 MR. McELFISH: This might have been a false alarm on
12 the side bar. So what the witness has testified to was during
13 his first deposition which was in May of 2015, that he was
14 asked had he had any sexual intercourse, yes, May 2015, if he
15 had sexual intercourse and he said that he, he was with
16 someone. Then he was asked again in December 18th of 2015 if
17 he had sexual intercourse from the time of the accident and he
18 said he thought he understood, he misunderstood the question,
19 he thought it was from the first deposition because of the
20 first deposition, he came clean on it, he copped to it. He
21 didn't understand it. So now they want to put the record in
22 that's before this.

23 THE COURT: I'm sorry.

24 MR. McELFISH: So now they want to put a record in
25 up here from March shows he had blown a condom during the time

Side Bar

1961

1 he did not deny it. It doesn't impeach him.

2 MR. BARMEN: Your Honor, if you remember, we put
3 this up in open -- we redacted the part that says STD but
4 nothing else was redacted and everything else has already been
5 shown.

6 THE COURT: Do you have his first deposition?

7 MR. BARMEN: Yes, I do.

8 MR. SAAL: It's Defendants' 332.

9 THE COURT: Defendants' 332.

10 MR. McELFISH: Now, can I give you a heads up about
11 that?

12 THE COURT: Do you know where he was asked that
13 question?

14 MR. McELFISH: I don't and I don't know that he was.
15 That's his testimony which surprised me a little bit but I
16 don't know where, if he was, but he tells me that it, that he
17 was either not asked it or he admitted it, one of the two.
18 Because, Judge, he was doing it, trying to do it during that
19 time.

20 MR. MANNION: If I may, Your Honor.

21 THE COURT: I'll allow it because at his second
22 deposition, he was asked since October of 2013, he said no.
23 So whether he, and he said, I was confused. I'm going to
24 allow it because if it's not in his first deposition, you
25 can't cite to that.

Side Bar

1962

1 MR. BARMEN: The word "sex" doesn't appear in the
2 first deposition.

3 MR. McELFISH: Can we have some way of doing it so
4 these prejudicial details don't get in about, you know, STDs
5 and things of that nature? It's entirely unnecessary.

6 MR. MANNION: We're not going to say "STD."

7 MR. BARMEN: No. "STD" is being redacted.

8 MR. McELFISH: What's that?

9 MR. BARMEN: "STD," we redacted.

10 MR. McELFISH: Can you ask him if he went to the
11 hospital with an issue related to sex? I'm okay with that.

12 MR. MANNION: No.

13 MR. McELFISH: No.

14 MR. BARMEN: Because the records again go beyond
15 that.

16 MR. McELFISH: He'll admit that he went.

17 THE COURT: I don't see that.

18 MR. BARMEN: We redacted it.

19 THE COURT: That's fine.

20 MR. BARMEN: Okay.

21 (Side bar conference ends.)

22 (Continued on next page.)

23

24

25

Bauta - cross - Barmen

1963

1 BY MR. BARMEN:

2 Q Sir, I want to -- before we go to the medical records, I
3 want to clarify something or at least try to and I want to
4 start back on page 162 of your December 18, 2015 deposition.
5 Maybe this will help clear it up. So that's GLI34118.

6 MR. McELFISH: I'm sorry. What is the --

7 MR. BARMEN: I'm going to start at line 19.

8 MR. McELFISH: Is this the first deposition?

9 MR. BARMEN: Second. December 18, 2015, starting at
10 line 19.

11 MR. McELFISH: Page?

12 MR. BARMEN: 162.

13 May I proceed, Your Honor?

14 MR. McELFISH: Hold on. One second, Your Honor.

15 THE COURT: Yes.

16 Q Sir, is it on the screen in front of you?

17 A Yes.

18 Q In your deposition on December 18, 2015, I asked you:

19 Question: Let me ask you a question. I don't mean
20 to prior -- I think it should have been "pry" -- or be
21 disrespectful. Were you sexually active before October 2013?

22 Did you answer yes?

23 A Yes.

24 Q Okay. Were you then asked: Were you sexually active
25 after the accident or was it something you just couldn't do

Bauta - cross - Barmen

1964

1 following the accident?

2 Did you answer: It hurt too much?

3 A Yes, I said, It hurt too much.

4 Q Okay. Were you then asked: If I asked you if you were
5 sexually active post October 2013, what would your answer be?

6 Did you not state, What do you mean by "post"?

7 A Yes.

8 Q At which point you were asked: After the accident, were
9 you sexually active up until today's date from October 2013 up
10 until whatever today's date is?

11 Was your answer no?

12 A And this is the second deposition --

13 Q Correct.

14 A -- you're reading from? And like I stated earlier --

15 THE COURT: Is that your testimony?

16 Q Was that your testimony?

17 A Yes.

18 Q Thank you.

19 MR. BARMEN: Now let's go to the record, please, go
20 back to the Brookdale records, the redacted March 22nd.

21 MR. McELFISH: The record has a page number at the
22 bottom so whenever you're ready, tell me the page number as
23 well.

24 MR. BARMEN: Yes. "File corruption." Super.

25 THE COURT: Do it the old fashioned way. Pull out a

Bauta - cross - Barmen

1965

1 paper copy and put it on the Elmo. Make sure it's redacted.

2 MR. BARMEN: It is, Your Honor.

3 MR. McELFISH: What page are you looking at?

4 MR. BARMEN: This is GLI40625.

5 Q Sir, you went to Brookdale Hospital on March 22nd of
6 2014. Do you see that date?

7 A Okay.

8 Q Okay? And you went there. Patient is a 38-year old male
9 presenting with general illness, history is provided by
10 patient. And you stated: One and a half weeks ago during
11 sexual intercourse, the condom ruptured.

12 That was in 2014, a year and a half before your
13 December 2015 deposition, correct?

14 A Yes.

15 Q Now, when you went there for that issue in March of 2014,
16 they did an additional workup, did they not?

17 A What do you mean?

18 Q Well, they didn't just check you for the issue you went
19 there for, they checked you neurologically, they checked you
20 musculoskeletally?

21 A No.

22 Q No? Sir, when they checked you at the time, does it
23 indicate at the bottom you were oriented to person, time and
24 place, well nourished, well developed, in no distress?

25 Is that what the record indicates?

Bauta - cross - Barmen

1966

1 A Yes.

2 Q Again, March of 2014. Same record. You see where it
3 states: No cranial nerve deficit?

4 They did a neurological check, did they not?

5 A No, they did not.

6 Q Okay. Can you now go to -- let's move on to the May
7 record.

8 MR. McELFISH: I think September is next.

9 MR. BARMEN: You're right, September.

10 MR. McELFISH: Same redaction, please.

11 Q Sir, you stated earlier that you've never been treated or
12 sought treatment for any type of head problem, correct?

13 A In the --

14 Q Prior to the accident?

15 A And I said that I was there one time when I was working
16 and I inhaled a lot of steam and I went to the hospital and
17 said that my head was hurting. They gave me an injection and
18 a pill and they told me just to relax.

19 Q And that was from inhaling steam?

20 A Yes.

21 Q Do you ever suffer from migraine headaches?

22 A No.

23 Q Did you ever indicate you suffered from chronic migraine
24 headaches?

25 A No.

Bauta - cross - Barmen

1967

1 MR. BARMEN: Bates 40992 in the Glaxton records.

2 Q This was in May of 2005. Do you remember, is that when
3 you went to the hospital when you inhaled steam?

4 A Yes.

5 Q Thank you.

6 Would you agree that nowhere in this record does it
7 indicate you were there because you inhaled steam?

8 You've seen this record before, right?

9 A No.

10 Q You've never seen this before?

11 A No, never.

12 Q You notice it indicates the headache you were there for
13 was similar to previous headaches? It says that, right?

14 A Yes, I see it circled.

15 Q Had you gone to the hospital for inhaling steam prior to
16 this time?

17 A Just that one time.

18 Q I also notice past history, chronic headaches, migraines.
19 That's what you told them when you went there, isn't it?

20 A No.

21 Q No? So this is another medical record that's wrong?

22 A I didn't say that.

23 MR. McELFISH: Objection. Argumentative.

24 THE COURT: Overruled.

25 Q Certainly you would agree there is a medical record that

Bauta - cross - Barmen

1968

1 indicating, prior to the accident, you sought treatment for
2 chronic migraines?

3 A Not for chronic migraines but bad headache, yes, at the
4 time.

5 Q You told me earlier that since your treatment with this
6 case, the treatment you sought since the accident, you've been
7 honest with your medical providers. Do you remember that?

8 A Yes, as much as I could.

9 Q Is it fair to say you were honest with the people you
10 sought medical treatment from before the accident?

11 A Say the last part?

12 Q Were you also honest with the people you sought medical
13 treatment from before the accident?

14 A Yes.

15 Q We already talked a little bit about how your employment
16 situation caused stress in your life since the accident,
17 right?

18 A Financially, yes.

19 Q And then you had some financial stresses and employment
20 issues before the accident, right?

21 A Yes, when I was employed.

22 Q You also had some additional personal issues prior to the
23 accident that caused stress in your life, is that fair?

24 A As pertaining to what?

25 Q Your legal troubles.

Bauta - cross - Barmen

1969

1 A Well, I don't really consider that stress. Just a
2 wake-up call.

3 Q What about your incarceration, was that a stressor?

4 A Same thing.

5 Q Just a wake-up call?

6 A It was a wake-up call.

7 Q Certainly you would agree that that wake-up call and the
8 results of it have impacted your ability to find work?

9 MR. McELFISH: Objection.

10 THE COURT: Overruled.

11 A Can you repeat that, please?

12 Q Sure.

13 That situation, that wake-up call, and the
14 consequences of it have impacted your ability to find work, is
15 that true?

16 A I wouldn't say that.

17 Q Have you been honest on job applications you filled out
18 since your release from prison?

19 A Yes, I have.

20 MR. BARMEN: Your Honor, I would ask to at this
21 point use that record.

22 MR. McELFISH: Objection.

23 THE COURT: Overruled.

24 MR. BARMEN: GLI42582, Exhibit 441. May I publish,
25 Your Honor?

Bauta - cross - Barmen

1970

1 MR. McELFISH: Foundation.

2 THE COURT: You've got to lay a foundation first.

3 MR. BARMEN: Thank you.

4 Q Sir, do you see the document on the screen in front of
5 you?

6 A Sort of, kind of. It's small.

7 MR. BARMEN: Can you blow it up there? Thank you.

8 Q Can you see it better now?

9 A Yes.

10 Q This is the application you put in to Save-A-Lot grocery
11 store on September 1, 2010, correct?

12 A Yes.

13 MR. BARMEN: Can you show a signature, please? Go
14 to the last page. I think it's a four page document. Keep
15 going. Thank you. Can you blow this up, please?

16 Q Sir, that's your signature on September 1, 2010, correct?

17 A Yes, correct.

18 Q And if you look at the top line under "Authorization,
19 please read carefully," it says: I hereby certify my answers
20 above are true and complete.

21 So by signing this, you're certifying the
22 information you put in this application was true and fair,
23 right?

24 A Yes.

25 Q And at that time, did you read this document?

Bauta - cross - Barmen

1971

1 A Yes, I did.

2 Q Go back to the first page, please.

3 MR. BARMEN: Your Honor, at this time, I would
4 request permission to publish.

5 MR. McELFISH: Objection. Foundation. Not in
6 discovery.

7 THE COURT: We will receive it in evidence. What
8 document is it?

9 MR. BARMEN: Defendants' 421 in full, Your Honor.

10 THE COURT: Received.

11 (Defendants' Exhibit 421 so marked.)

12 MR. BARMEN: Thank you.

13 (Continued on next page.)

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Bauta - cross - Barman

1972

1 BY MR. BARMEN: (Continuing.)

2 MR. BARMEN: Can you blow that up for me, please?

3 (Exhibit published.)

4 Q Sir, on this job application on September 1, 2010, that
5 was after your legal issue and your release from jail;
6 correct?

7 A Yes, correct.

8 Q You were asked in the middle of the page: "Have you ever
9 been convicted of a felony or any other crime of dishonesty
10 which has not been expunged?" What did you check?

11 A I checked "No."

12 Q So you were not truthful on that application?

13 A Doesn't it say if you've been convicted and the crime
14 hasn't been taken care of?

15 Q You were convicted of a felony; correct?

16 A Yes.

17 Q And it was not expunged; correct?

18 A That means I did my time and everything.

19 Q Have you produced any other job application that you
20 filled out in this case?

21 A I filled out quite a few job applications, I told you
22 already.

23 Q But have you provided them in this lawsuit?

24 A No.

25 MR. BARMEN: One moment, please.

Bauta - cross - Barman

1973

1 (Pause in proceedings.)

2 MR. BARMEN: I don't have any other questions for
3 you. One moment.

4 (Pause in proceedings.)

5 MR. BARMEN: Your Honor, defendants would move to
6 admit Defendant's 414. The Claxton report, 409-87 to 409-93.

7 THE COURT: Objection.

8 MR. McELFISH: As long as it's all of the Claxton
9 records, that's fine.

10 THE COURT: So the entirety of 409?

11 MR. BARMEN: No, Your Honor. 409 is the Save-a-lot.

12 THE COURT: 414 is the Claxton records?

13 MR. BARMEN: Yes, Your Honor.

14 THE COURT: The entirety of the exhibit?

15 MR. BARMEN: Yes, that's fine.

16 THE COURT: All right, 414 is received.

17 (Defendant's Exhibit 414 received in evidence.)

18 BY MR. BARMEN:

19 Q I have three or four more questions that my associate
20 gave me quick. Mr. Bauta, when you went to see Dr. Morgan you
21 knew he was an expert retained on behalf of Greyhound and
22 Sabrina Anderson; correct?

23 A Yes.

24 Q You knew he was going to give you neuropsychological
25 tests?

Bauta - cross - Barman

1974

1 A Not necessarily. I didn't find out until I got there.

2 Q You knew he was going to give you some testing when you
3 went there; right?

4 A Yes.

5 Q And you knew that the answers to those questions were
6 going to be used by Dr. Morgan for purposes of this lawsuit,
7 fair?

8 A No. I mean, I never really thought about it, but yeah.

9 Q You know there's seven days in a week; right?

10 A Yes.

11 Q In answering Dr. Morgans questions, though, you said
12 there were six days in a week, did you not?

13 A Excuse me?

14 Q When you answered Dr. Morgan's questions you said there
15 were six days in a week; isn't that true?

16 MR. McELFISH: Foundation, with this witness.

17 THE COURT: Sustained.

18 Q Do you know there's 50 states in the union?

19 MR. McELFISH: Objection, argumentative and
20 foundation with this witness.

21 THE COURT: Sustained.

22 Q Sir, have you ever been treated by a doctor for any type
23 of hearing deficiency?

24 A Yes.

25 Q When?

Bauta - redirect - McElfish

1975

1 A It was a few years ago. I think it was Dr. Honor.

2 Q Dr. Honor did some hearing tests for you?

3 A Something like that.

4 Q Other than Dr. Honor, have you ever been treated by any
5 type of medical professional for any type of hearing problem?

6 A The regular pediatrician exams.

7 Q Regular testing when you were a kid, fair?

8 A Yes, yes.

9 MR. BARMEN: I have no further questions.

10 REDIRECT EXAMINATION

11 BY MR. McELFISH:

12 Q Okay, Mr. Bauta, I just want to cover a couple of issues
13 that Mr. Barman was asking you about. He was asking you about
14 public assistance before and after the accident and I'd like
15 you to explain to the jury when you had it before, if you had
16 it before and after, please.

17 A Before the accident, I was collecting unemployment. At
18 the time of the accident, I realized my unemployment was about
19 to finish so I applied for public assistance.

20 Q And why did you do that?

21 A Well, I knew they would offer some kind of work and,
22 like, GEDs so I took the GED course.

23 Q And after the accident did you apply for public
24 assistance because you couldn't work?

25 A Yes, correct.

Bauta - redirect - McElfish

1976

1 Q And did you need money to support your family and your
2 kids?

3 A Yes, correct.

4 Q And you couldn't work because of?

5 A The pain that I was suffering.

6 Q Mr. Barman showed some exhibits, two pages from
7 McDonald's, where some corporate person signed a declaration.
8 Do you remember that?

9 A Yeah.

10 Q To remind the jury, when did you start at McDonald's?

11 A Around 2003, 2004, around there.

12 Q And when did you get laid off?

13 A About a year after.

14 Q I'm sorry?

15 A The final time or before?

16 Q Sorry, let me ask a clearer question. You first began
17 working for McDonald's for the first time when?

18 A 2003, 2004, around there.

19 Q And when was the last time you worked at McDonald's?

20 A The last time was in 2012.

21 Q Now, 304 is in evidence and there's 20 pages and not two
22 so I would like to show you a few of those pages.

23 MR. McELFISH: May I publish?

24 THE COURT: Sure.

25 (Exhibit published.)

Bauta - redirect - McElfish

1977

1 Q Now, the first two pages of this exhibit, Mr. Bauta, just
2 I will represent to you these are the two documents that
3 Mr. Bauta showed you.

4 THE COURT: Barmen.

5 Q But here is my question, let's go to 304-003. Does it
6 indicate there in the middle of the page what kind of work you
7 were doing?

8 A Yes.

9 Q What was it?

10 A Swing manager.

11 Q And these are -- was the name of the business that was a
12 McDonald's franchise Lettuce something? What was it called?

13 A Lettuce Feed You. Like the vegetable, Lettuce Feed You.

14 Q So that was the d/b/a for the McDonald's?

15 A Yes.

16 Q Okay. So is this -- is this your W-2 form for McDonald's
17 or Lettuce Feed You for 2007?

18 A That is correct. It is.

19 Q And is this your W-2 form from McDonald's from 2008?

20 A Yes, it is.

21 Q And 2009?

22 A Yes.

23 Q 2011?

24 A Yes.

25 Q And while you were there, during that time -- well,

Bauta - redirect - McElfish

1978

1 withdrawn.

2 First of all, the statement in the first page that
3 you were there for a short time is incorrect?

4 A Correct.

5 Q And these documents showing, at least going back to 2007,
6 that you were receiving a W-2 and you were working there;
7 correct?

8 A Yes, correct.

9 Q As a manager?

10 A Yes, correct.

11 Q Now, this is in evidence as -- somehow the mark is
12 covered up, but it's Exhibit 304. This is a performance
13 review?

14 A Yes, it is.

15 Q Did you get good marks while you worked there?

16 A Yes.

17 Q And this is the second page of that review?

18 A Yes it is.

19 Q In fact, you were evaluated in almost every area of your
20 work?

21 A Yes, correct.

22 Q And you got good marks?

23 A Yes.

24 Q Perhaps there was a little bit of a constructive
25 criticism by management but overall you had positive marks?

Bauta - redirect - McElfish

1979

1 A Yes.

2 Q And that was a 2011 evaluation; correct?

3 A Yes.

4 Q And then we have one again in March of 2012?

5 A Yes.

6 Q And I'm going through these quickly because they're in
7 evidence and we're short on time. These are your hours and
8 earnings from 2012; correct?

9 A Yes, correct.

10 Q So indeed you were there for a long time and you were
11 there as a manager?

12 A Yes.

13 Q Okay. Now the Sav-a-Lot application, had you ever seen
14 that document since then?

15 A No. Just the day that I filled it out and turned it in.

16 Q Okay. And when you marked "No" for crime or what felony,
17 what was your understanding of what they were asking you?

18 A To my understanding was that they were pertaining to if
19 you've ever been convicted of a felony and it was taken care
20 of. You did your time and you're not dealing with it anymore.
21 That was my understanding.

22 Q Are you relying on trying to figure out the word
23 "expungement"?

24 A Yes, sir.

25 Q Have you filed other applications?

Bauta - redirect - McElfish

1980

1 A Yes, I did.

2 Q How many?

3 A Quite a few. I named them already, from Walgreen's,
4 Pizza Hut, Sunoco, that was Upstate New York. Down here I
5 applied to Associates, Pathmark. When it used to be open. It
6 was a few of them, quite a few.

7 Q That is a few there. Did you mean to be dishonest on the
8 Sav-a-Lot application?

9 A No.

10 Q And were you dishonest on any of the other applications
11 that you filed?

12 A No, I wasn't.

13 Q And we haven't seen any of those here; right?

14 A No.

15 Q Now, at the time of the accident you had a girlfriend
16 either upstate or in Cleveland?

17 A Yes.

18 Q Where was it?

19 A It was in Cleveland.

20 Q And you talked to Dr. Goldman about doing a test to see
21 how you would do because you don't fly; right?

22 A No.

23 Q Why not?

24 A Scared of heights.

25 Q Really scared of heights?

Bauta - redirect - McElfish

1981

1 A Yeah.

2 Q That's why you take buses, trains?

3 A Yes.

4 Q Okay. And you wanted to see your girlfriend and you
5 talked to Dr. Goldman about that?

6 A Yes.

7 Q Was that an enjoyable trip for you?

8 A Not even.

9 Q Now you were shown the intake forms for 110 West 34th
10 Street where Mr. Colbert's name was on them. Do you remember
11 those?

12 A Yeah, I remember him showing me.

13 Q Okay. And did you retain Mr. Colbert before you ever
14 went to the doctor?

15 A Yes.

16 Q And why did you retain Mr. Colbert?

17 A Because I was, like I said, paranoid from Greyhound
18 constantly calling me.

19 MR. BARMEN: Objection.

20 MR. McELFISH: The door was opened, Judge.

21 THE COURT: Sustained.

22 MR. BARMEN: Move to strike, please.

23 THE COURT: Stricken.

24 BY MR. BARMEN:

25 Q When you went to 110 West 34th Street, did they ask you

Bauta - redirect - McElfish

1982

1 if you would sign a Tien?

2 A Yes.

3 Q And did they ask you if you had an attorney that would be
4 willing to work on the Tien with them?

5 A Yes.

6 Q Okay. Otherwise, would you have been able to afford the
7 treatment?

8 A No.

9 Q Prior to the accident, you were asked about your child
10 support payments and you indicated and you were under an
11 agreement to pay those bills; correct?

12 A Yes, correct.

13 Q And for all of your children?

14 A Yes.

15 Q And for the most part did you pay those bills?

16 A Whenever I had money, that's what I did, I sent them.

17 Q Okay. And only the times when you were not working at
18 McDonald's did you fall behind?

19 A Yes, correct.

20 Q You were shown the documents and intake forms when you
21 went to see Dr. Morgan, the defense psychologist here. Do you
22 remember that?

23 A Repeat that.

24 Q Yes. You were shown the forms by Mr. Barmen when you
25 went in to see Mr. Morgan, the defense neuropsychologist. Do

Bauta - redirect - McElfish

1983

1 you remember those forms?

2 A Yes.

3 Q And you were asked whether or not you were advised
4 whether or not you could stop the test or break up the test.

5 Do you remember those questions?

6 A Yeah, I remember.

7 Q Did Dr. Morgan ever go over these forms with you?

8 A Not necessarily.

9 Q Did he ever speak to you about whether or not you had any
10 control at all over the test environment?

11 A Not that I remember.

12 MR. BARMEN: Objection.

13 THE COURT: Overruled.

14 A Not that I remember.

15 Q Did you understand that you were required to be there in
16 this litigation at the defense request and that you were to
17 complete the test as asked?

18 A Yes, I understand that.

19 Q You were asked all of these questions about when you
20 testified in your depositions you were stiff here, you were
21 stiff there. Is that inconsistent with anything you've told
22 this jury so far?

23 A So far everything I've said is consistent.

24 Q From the time of this accident, have you had pain and
25 stiffness and even the inability to move your neck to a

Bauta - redirect - McElfish

1984

1 certain degree?

2 A Yes.

3 Q And you were asked about the deposition testimony where
4 you were asked about sexual activity, do you remember that?

5 A Yes.

6 Q Your deposition -- your first deposition in this case,
7 the first of three, was taken in May of 2015; right?

8 A Yes.

9 Q But the record they tried to -- that they showed the jury
10 was from March of '15, two months before that. Do you
11 remember that?

12 A Yes.

13 MR. BARMEN: Objection.

14 THE COURT: Overruled.

15 Q They couldn't show you a deposition transcript where you
16 denied it at that time, true?

17 MR. BARMEN: Objection.

18 A No.

19 THE COURT: You can show him the deposition
20 transcript and have him find it. You opened the door.

21 MR. McELFISH: I'm sorry?

22 THE COURT: You opened the door.

23 MR. McELFISH: Okay.

24 THE COURT: Give him his first deposition transcript
25 and let him find where it was.

Bauta - redirect - McElfish

1985

1 THE COURT: Continue, Mr. McElfish, while they find
2 it.

3 MR. McELFISH: Sure.

4 BY MR. McELFISH:

5 Q When you were asked about the sexual activity in December
6 of '15, almost a year and a half after that hospital visit,
7 what was your understanding of the question?

8 A That they was asking me from my second deposition to the
9 present time where I was being questioned.

10 Q Understood.

11 MR. McELFISH: What is this?

12 THE COURT: This is his first deposition transcript.

13 MR. BARMEN: Find it.

14 MR. McELFISH: Find what?

15 MR. BARMEN: What you're asking. You know it's not
16 in there.

17 THE COURT: We're going to take a break.

18 MR. McELFISH: Based on this?

19 THE COURT: We're going to take a break and give
20 Mr. Bauta a chance to read through that deposition transcript
21 and find where he was questioned about his sexual activity.
22 We will come get you when we are ready.

23 (Jury exits.)

24

25 (Continued on the following page.)

Proceedings

1986

1 (In open court.)

2 (Judge RAMON E. REYES enters the courtroom.)

3 THE COURT: All right, have we found it?

4 MR. McELFISH: Not exactly. What I found was, and I
5 think, I can't speak for the witness.

6 THE COURT: All right. Ask Mr. Bauta to leave,
7 then.

8 MR. McELFISH: Can I tell what you it is, first?

9 THE COURT: No, not in front of Mr. Bauta.

10 Mr. Bauta, could you step out, please.

11 MR. BARMEN: Could you tell me what page you are
12 referring to, please.

13 MR. McELFISH: Let me tell what you it is, first,
14 and then you can certainly have it back.

15 MR. BARMEN: I have another copy here, can you just
16 tell me the pages?

17 MR. McELFISH: These are the pages.

18 (Witness exits courtroom.)

19 THE COURTROOM DEPUTY: That is a copy of the second
20 deposition, Mr. McElfish?

21 MR. McELFISH: That is a copy of his first,
22 May 21st.

23 THE COURT: Which is 331? No.

24 MR. SAAL: 332, Your Honor.

25 THE COURT: 332. All right.

Proceedings

1987

1 MR. McELFISH: It is GLI-33710.

2 Before you do that, now that Mr. Bauta is gone, let
3 me explain.

4 THE COURT: Yes.

5 MR. McELFISH: So, I looked through the transcripts
6 and there is no direct question about whether he engaged in
7 sex after the accident. However, there is a lot of questions
8 about what girlfriends he had before the accident. He's
9 asked -- all these tabs here are questions Mr. Moroknek asked
10 him; who he was dating, who he was with, specifically Amy
11 Barrett Upstate and Rebecca Dody and perhaps that's what the
12 witness is recalling. I didn't expect to hear him say what he
13 said. That's neither here nor there.

14 There is all these references to relationships that
15 he was asked in the first deposition. So in full disclosure,
16 without any problem, there's no direct question, he was never
17 asked about whether or not he had sex after the accident in
18 this deposition.

19 THE COURT: And you knew that at side-bar --

20 MR. McELFISH: I tried to tell you, yes.

21 THE COURT: -- right?

22 So the problem is that you tried to reinforce
23 Mr. Bauta's -- even if it was a misunderstanding, what I think
24 is actually a direct falsehood, that he told him to stand --
25 you tried to reinforce that with the jury, all right? If it

Proceedings

1988

1 is not subornation of perjury, it is as close as you can get.

2 How are you going to fix it? That is what I want to
3 know. You have two options as I can see.

4 MR. McELFISH: Tell me.

5 THE COURT: Number one, come clean with the jury
6 that he was not asked that question.

7 MR. McELFISH: Sure.

8 THE COURT: Or, you go through the entire transcript
9 and do it on redirect. Your choice.

10 MR. McELFISH: I will take the first choice. I
11 think that's the truth.

12 THE COURT: All right.

13 MR. McELFISH: It was not asked and it was a
14 misunderstanding, sure.

15 MR. BARMEN: There is another misunderstanding, Your
16 Honor, that needs to be addressed along the same bank.

17 Mr. McElfish got up and he said, rather aggressively
18 to Mr. Bauta when talking about the Sav-a-Lot application,
19 that I didn't show him the other applications, that Mr. Bauta
20 rattled off other places he had applied to. Request for
21 production number 23 that we sent to them: Produce copies of
22 all job applications plaintiff has completed including but not
23 limited to job applications at Walgreen's, Sav-a-Lot,
24 Pizza Hut, Sunoco. The only one we ever got was the
25 Sav-a-Lot.

Proceedings

1989

1 We requested all the other ones, they never produced
2 them and yet now he's gone in front of the jury and somehow
3 castigated me for not putting them in front of him.

4 THE COURT: So redirect him on that.

5 MR. McELFISH: Let me respond. That's a falsehood.

6 What happened was they served that request on me, I
7 didn't have anything to give them. They moved the Court and
8 the Court ordered me to give all of the authorizations for all
9 of the job applications on Sunoco -- I have them somewhere in
10 the file -- Sunoco, Walgreen's, all these places. They have
11 all the authorizations, that's how they got Sav-a-Lot. I
12 actually never -- I never actually got any of the, I didn't
13 get the Sav-a-Lot one, but they had all the authorizations.
14 Five, seven of them, eight of them that you ordered me to give
15 them and now they want to turn around and say I'm a liar
16 because I didn't give it to them. They're the ones that had
17 the authorizations. And they know that.

18 THE COURT: You didn't get the Sav-a-Lot
19 application. We are back to that. You are really going
20 there.

21 MR. McELFISH: I personally did not see it.

22 THE COURT: Did your law firm get it?

23 MR. McELFISH: I don't think -- what we didn't do,
24 Judge, is we didn't serve out all these application
25 authorizations to all these places probably like they did.

Proceedings

1990

1 You ordered me to give them authorizations, I gave it to them.
2 I don't think we necessarily duplicated them.

3 THE COURT: That is not what I am asking.

4 MR. McELFISH: Okay.

5 THE COURT: You did not get them. Once they served
6 them authorizations and got it from the Sav-a-Lot, they did
7 not produce it to you? Is that what you are saying?

8 MR. McELFISH: I want to be very careful here.

9 THE COURT: Please.

10 MR. McELFISH: Because I truly don't recall seeing
11 it before and I know how you feel about what you said over
12 there. I get it.

13 I don't recall seeing it before. I can't find it in
14 any of Dr. Morgan's materials. I don't even see his first set
15 of records at his first deposition. The second deposition
16 it's just, it's not his file. So, I don't know if they gave
17 it to me, but I don't recall seeing it.

18 And I think you correctly said -- Ms. Diamond wasn't
19 with me back then maybe somebody else had it.

20 But it's in evidence. What does that matter? You
21 let it in.

22 THE COURT: Did you send out authorizations?

23 MR. McELFISH: You ordered it.

24 MR. SAAL: Your Honor, I have no record that we have
25 authorizations for anything but Sav-a-Lot. We have a list of

Proceedings

1991

1 the authorizations we received and request and send out, and
2 there is no mention for Walgreen's employment records, no
3 mention for Sunoco.

4 I have the same paralegal working on this case for
5 two years, since before I joined the firm and she's meticulous
6 and it is not on her list.

7 MR. McELFISH: I'm going to find the authorizations.
8 I'm tired of him calling me a liar, Judge. I mean, there are
9 things that I have misunderstood like everybody does but they
10 are literally calling me a liar now and I'm going to find the
11 order of the Court and the authorizations.

12 And you can smirk at me all you want.

13 MR. BARMEN: I wasn't smirking at you.

14 MR. McELFISH: At least I have tough skin,
15 Mr. Barmen.

16 Are you going to allow him to confront with the
17 discovery requests?

18 THE COURT: I thought you were going to --

19 MR. McELFISH: Find them?

20 THE COURT: -- find them.

21 MR. McELFISH: I'm going to try to find them. I
22 just don't want to waste time, that's all.

23 Here, somebody handed this up to me.

24 I need just a few seconds.

25 THE COURT: Take your time.

Proceedings

1992

1 (Pause in the proceedings.)

2 MR. McELFISH: Okay, so now I will correct myself.

3 They requested authorizations for all of those and
4 including his cell phone, Straight Talk, everything. The
5 Court ordered them to turn over Let Us Feed You, Sav-a-Lot,
6 four or five different Sav-a-Lots, Canton Street, Park Street,
7 Route 11, Corporate. We gave them all those authorizations
8 and then some other medical stuff.

9 So, we gave them what you ordered me to give them.
10 I guess I did not send them out myself or I sent them and
11 didn't get anything back or whatever. And I'm going to keep
12 looking because for some reason I have, I gave him the rest
13 but for right now I can certainly find this. That was on
14 April 15th, 2016.

15 MR. BARMEN: I don't understand really what he's
16 saying. We don't have, we sent discovery requests for these
17 other applications. We never got them. We never got the
18 authorizations for them.

19 THE COURT: What is this going to?

20 MR. BARMEN: What it goes to, it wouldn't be a big
21 deal, Your Honor, but he got in up in front of the jury and
22 acted as if somehow we're playing dirty when, in fact, that's
23 not the case.

24 Why didn't we put these other applications in front
25 of him? First of all, when Mr. Bauta was deposed -- and it

Proceedings

1993

1 wasn't me, I wasn't involved in the case, yet -- when
2 Mr. Moroknek deposed Mr. Bauta on this issue he remembered one
3 grocery store and nowhere else he'd put in applications.
4 That's what led to the discovery request.

5 And he acts as if it was produced and somehow I'm
6 trying to hide the ball by not putting in front of him when
7 we've never had it. It wasn't produced. So, in terms of the
8 larger scheme of things, it is not important in terms of
9 value.

10 THE COURT: Then let's move on.

11 MR. BARMEN: But I don't want the jury not being
12 told that what happened there wasn't, in fact, true.

13 MR. McELFISH: Can you pass this up?

14 Judge, you've got to see that.

15 MR. MOROKNEK: Can we see it before you show it to
16 the Judge.

17 MR. McELFISH: I did sent out an authorization
18 Sav-a-Lot. They said, no records. I've got a response, the
19 corporate representative with a declaration saying, and I
20 quote: Super Value -- which owns Sav-a-Lot because it was
21 sent to Sav-a-Lot -- has no record of personnel payroll
22 records pertaining to Jose Bauta.

23 MR. BARMEN: Well, they wouldn't have payroll
24 records. He never got hired.

25 MR. McELFISH: I understand that. But we said here

Proceedings

1994

1 Mr. Bauta has indicated he submitted an employment
2 application. It says Barclay's but it went to Sav-a-Lot. See
3 that? Sav-a-Lot 100 Corporate Office Drive, Missouri.

4 I mean, I got a response from them. It didn't have
5 the document in it.

6 But I am going to find the Walgreen's and the Sunoco
7 because I know it was sent.

8 MR. BARMEN: Your Honor, I want Mr. McElfish to
9 explain to the jury that that question was never asked and I
10 would ask that the jury be instructed by you that those
11 questions were improper for the reasons indicated. Because
12 they're left with the impression that somehow I am trying to
13 play "gotcha" with Mr. Bauta on documents that I should have
14 shown him but I've never had.

15 THE COURT: We are just going to move on.

16 Mr. McElfish is going to clear up the sexual
17 relations issue by coming clean to the jury that that was
18 never asked of Mr. Bauta in his first deposition and we are
19 going to move on. We need to finish him by tonight and you
20 need to do re-cross. Very brief.

21 MR. BARMEN: Understood.

22 THE COURT: All right?

23 MR. McELFISH: Yes.

24 Do you need this back? I don't know what you have
25 back there.

Proceedings

1995

1 THE COURT: We have it on the computer.

2 MR. McELFISH: Okay.

3 (Pause in the proceedings.)

4 MR. McELFISH: Judge, in clearing this up, can I ask
5 him if he was asked about personal relationships? Because
6 that's what he was asked about.

7 THE COURT: No, no. There were no questions from
8 Mr. Barmen about personal relationships. It was about sex;
9 whether he was having sex.

10 MR. McELFISH: Got it.

11 THE COURT: There are consequences, Mr. Barmen. You
12 are going to see it right here.

13 (Pause in the proceedings.)

14 MR. MOROKNEK: Your Honor, can I send Dr. Morgan
15 back? We're not going to get to him today, I take it.

16 THE COURT: Yes, you can.

17 MR. MOROKNEK: Thank you.

18 (Witness resumes stand.)

19 (Jury enters.)

20 THE COURT: You may be seated.

21 MR. McELFISH: May I inquire? Yes.

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23 (Continued on following page.)

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Bauta - redirect - McElfish

1996

1 DIRECT EXAMINATION (Continuing)

2 BY MR. McELFISH:

3 Q Mr. Bauta, we checked your deposition in May of 2015,
4 there was no specific question about sex.

5 Was that your understanding?

6 A Yes.

7 Q Now, when Mr. Barmen was asking you about the trouble you
8 got in, and you said it was a wake-up call, what did you mean
9 by that?

10 A It made me realize I gotta be better for my kids because
11 eventually, they're going to be growing and that kind of life
12 is not for me. And just take, make better choices, make
13 better decisions and just do what I'm supposed to do for
14 myself, to better myself for my kids.

15 Q And have you had any issues like that at all since 2006?

16 A No.

17 Q All right.

18 And what's most important --

19 MR. McELFISH: Last question.

20 Q What's most important to you today, Mr. Bauta?

21 A My kids. Their future. Their well-being. That's what's
22 more important to me.

23 MR. McELFISH: Thank you, sir.

24 Your witness.

25 MR. BARMEN: Thank you.

Bauta - recross - Barmen

1997

1 RECROSS-EXAMINATION

2 BY MR. BARMEN:

3 Q We were talking about job applications, and we showed you
4 the one from Sav-a-Lot, and your Counsel on redirect asked me
5 why I didn't show you others.

6 Do you remember that?

7 A Sort of, kind of, yeah.

8 Q Okay. You recall during the course of this case you had
9 to answer some written questions before you were ever deposed
10 called interrogatories?

11 A Say that again?

12 Q Do you remember answering some written questions, writing
13 things down on paper to respond to questions we asked on
14 paper?

15 Do you recall that?

16 A No, I don't recall that.

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18 (Continued on following page.)

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Bauta - cross - Barmen

1998

1 BY MR. BARMEN: (Continuing)

2 Q Do you recall having to gather documents to produce to us
3 in this case as part of the discovery process?

4 A There was some, yes.

5 MR. BARMEN: Okay. Can you pull up GLI32986.

6 Exhibit 319. GLI32986.

7 MR. McELFISH: That's fine.

8 Q If you look at request for production number 23, sir, you
9 are asked to produce to us copies of all job applications that
10 you completed including, but not limited to, Walgreens,
11 Save-A-Lot, Pizza Hut and Sunoco. You were asked to produce
12 all job applications, right?

13 A Okay. Am I supposed to be seeing it here too?

14 Q If you don't see it, touch it. You got it?

15 A I see -- yes.

16 Q You were asked to produce every job application you ever
17 filled out --

18 A Yes.

19 Q -- from the time of the accident forward?

20 A Yes.

21 Q But we were only given the Save-A-Lot one. Why?

22 A The other ones were online and I said that.

23 Q Do you have any proof of that whatsoever?

24 A No.

25 Q Your biggest concern right now is providing a better life

Bauta - cross - Barmen

1999

1 for your kids?

2 A Yes.

3 Q When was the last job application you filled out?

4 A My last job application?

5 MR. McELFISH: Objection.

6 THE COURT: Overruled.

7 A That I know of was for, it was the Barclays Center
8 application.

9 Q How long ago?

10 A It was, it was some time ago. I'm not sure.

11 Q In response to this, you didn't say that you filled out
12 applications online. You said you didn't have any, right?

13 MR. McELFISH: Objection.

14 THE COURT: I like the language with the substantive
15 response to this request.

16 Q You just let us know you didn't keep any records; you
17 didn't say anything about having filled them out online or
18 anything?

19 A I pretty sure I mentioned that I filed them online.

20 Q This was your response.

21 A Yes, I was asked that question plenty of times.

22 Q Plaintiff has made a diligent search of his records and
23 finds he did not keep any records or copies of any job
24 applications he filed including, but not limited to,
25 Walgreens, Save-A-Lot, Pizza Hut and Sunoco.

Bauta - redirect - McElfish

2000

1 Now, at the time that you responded to this, I know
2 you didn't have a computer, true?

3 A True.

4 Q Do you have a computer now?

5 A No.

6 Q Thank you.

7 A You're welcome.

8 REDIRECT EXAMINATION

9 BY MR. McELFISH:

10 Q Mr. Bauta, in your May 21, 2015 deposition --

11 MR. BARMEN: Objection. Outside the scope.

12 THE COURT: What?

13 MR. McELFISH: Let me give the page and line and the
14 Court can check. Let me plug it in, Judge, so I can give it
15 to you on the small screen.

16 THE COURT: What page is this? This is the
17 May 21st --

18 MR. McELFISH: Yes, sir. 104. Wait a second. It's
19 page 105.

20 THE COURT: Lines?

21 MR. McELFISH: Lines -- beginning with, "Sir, in the
22 beginning of 2013." I don't have the lines. It's 16, 16
23 through 22.

24 MR. BARMEN: Objection.

25 THE COURT: I will allow it.

Bauta - redirect - McElfish

2001

1 MR. BARMEN: Actually, we can go over to page 106,
2 line 9.

3 THE COURT: I will allow it.

4 MR. BARMEN: It predates the discovery demand, Your
5 Honor. This is what prompted the discovery demand.

6 THE COURT: I think he is going to a different
7 issue.

8 Q You were asked the following questions on May 21, 2015
9 and you gave the following answer.

10 Question: Sir, in the beginning of 2013, did you
11 fill out any employment applications online in Ogdensburg, New
12 York or anywhere else for that matter?

13 Answer: I filled out some online but I don't
14 remember if it was the beginning of '13, but I did do them
15 online.

16 Question: Do you remember when they were, if not
17 the beginning of 2013?

18 Answer: No.

19 Question: Was it during the year 2013?

20 Answer: Yes.

21 Question: And do you remember the companies you
22 filled out the applications for?

23 Answer: I just told you.

24 Question: Oh, those were all online applications?

25 Answer: Yes.

Bauta - recross - Barmen

2002

1 THE COURT: Is that your testimony?

2 Q Is that your testimony, sir?

3 A Yes.

4 MR. McELFISH: No further questions.

5 THE COURT: Is that it?

6 MR. BARMEN: Two questions.

7 THE COURT: Two.

8 RECROSS-EXAMINATION

9 BY MR. BARMEN:

10 Q Sir, you've been sitting here all day. How are you
11 feeling?

12 A Sore.

13 MR. McELFISH: Objection. Outside the scope.

14 THE COURT: Sustained. Sustained.

15 Mr. Bauta, you are excused. Thank you.

16 THE WITNESS: Thank you.

17 (Witness excused.)

18 (Continued on next page.)

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2003

1 THE COURT: All right. Ladies and gentlemen -- you
2 can stay seated, Mr. Bauta.

3 Ladies and gentlemen, we are done for the day.

4 Same drill. See you tomorrow at 9 o'clock.

5 (Jury exits.)

6 THE COURT: We should have asked the jury to stay
7 for the official resting.

8 Are you resting or are you calling anybody else?

9 You're not resting yet but legally, are you resting? The jury
10 is entitled to hear that.

11 MR. McELFISH: Can I check notes and rest in the
12 morning? I'm sure I'm resting but --

13 THE COURT: Let's do it in the morning. We can pull
14 them in at 9:30 and we're going to go right into testimony,
15 right? Because we're reserving. Tomorrow is Friday?

16 MR. McELFISH: Tomorrow is Friday already.

17 THE COURT: We are going to do the motions tomorrow.

18 MR. BARMEN: Yes. Rob will be here tomorrow.

19 (Matter adjourned to May 11, 2018 at 9:15 a.m.)

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2004

1 I N D E X

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